Supreme Court, U.S.

(1)

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In The

Supreme Court of the United States

TOWNSHIP OF UPPER MORELAND,

Petitioner,

v.

NORTHWOOD CONSTRUCTION COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Pennsylvania

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the decision of the Supreme Court of Pennsylvania invalidating a municipal gross receipts tax on the basis of this Court's decision upholding an unapportioned sales tax in *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, 514 U.S. 175 (1995), conflicts with this Court's line of cases specifically upholding unapportioned gross receipts taxes.

2. Whether a state court may impose a single formula that a municipality must use to apportion interstate income for purposes of imposing a business privilege tax on the gross receipts of a taxpayer with its sole office within the municipality.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully asks this Court to issue a writ of certiorari to review the judgment of the Supreme Court of Pennsylvania in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania (App., *infra*, 1a to 32a) reversing in part and affirming in part the decision of the Commonwealth Court of Pennsylvania is reported at 856 A.2d 789. The opinion of the Commonwealth Court of Pennsylvania (App., *infra*, 33a to 44a) affirming judgment for petitioner is reported at 802 A.2d 1269. The opinion and order of the Court of Common Pleas of Montgomery County (App., *infra*, 45a to 56a) granting petitioner's motion for summary judgment is unreported.

JURISDICTION

The Supreme Court of Pennsylvania rendered its decision on September 2, 2004. App., *infra*, 1a. Justice Souter extended the time within which to file a petition for a writ of certiorari to and including January 31, 2005. This Court's jurisdiction is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Commerce Clause of the United States Constitution provides that "Congress shall have Power * * * [t]o

regulate Commerce * * * among the several States." U.S. CONST. Art. I, § 8, cl. 3.

STATEMENT

A. Factual Background

1. Upper Moreland's Business Privilege Tax

Petitioner, Upper Moreland Township ("Upper Moreland"), a Pennsylvania municipality, imposes a Business Privilege Tax ("BPT") on the gross receipts of "[e]very person engaging in a business" in Upper Moreland. App., *infra*, 63a ("BPT Ordinance").

"Gross receipts" for purposes of the BPT include "cash, credits, property of any kind or nature, received or allocable or attributable to any business, or services rendered * * * ." *Id.* at 60a (BPT Ordinance § 1.02(f)). Excluded, however, are "[r]eceipts upon which a business privilege tax or similar tax has been imposed by another political subdivision by reason of the performance of the service or conducting the business in that political subdivision." *Id.* at 60a (BPT Ordinance § 1.02(f)(4) (the "Exclusionary Provision")).

Moreover, the BPT Ordinance requires Upper Moreland to

> promulgate rules and regulations setting forth methods of allocation of gross receipts for such cases where the gross receipts of a business in its entirety are not subject to [the BPT] by reason of the Commerce Clause of the United States Constitution or under the Constitution of the Commonwealth of Pennsylvania.

Id. at 61a-62a (BPT Ordinance § 1.02(f)(9)). Accordingly, Upper Moreland adopted regulations entitled "Regulations * * * Providing For The Allocation Of Gross Receipts In The Case Of A Business With Multi-State Offices Engaged In Interstate Commerce." *Id.* at 74a-75a ("Allocation Regulations").

The Allocation Regulations explicitly limit their applicability:

> 1. *APPLICABILITY*. The allocation of gross receipts provided for in this Regulation ***shall apply to, and only to***, persons * * * engaged in interstate commerce, ***having places of business in more than one State***. This Regulation shall not apply to or be deemed to apply to any intrastate transactions or to otherwise limit [*sic*].

Id. at 74a (Allocation Regulations ¶ 1) (emphasis added).

The method of allocation is set forth as follows:

> 2. *ALLOCATION*. In the case of transactions involving interstate commerce, in conformity with the commerce clause of the United States Constitution, an apportionment of gross receipts will be made upon the following formula:
>
> (Receipts within Commonwealth of PA x 100%) +
>
> (Receipts without Commonwealth of PA x apportionment factor) =
>
> Gross Receipts that Tax is applied to.

Id. at 74a (Allocation Regulations ¶ 2).

The Allocation Regulations further provide that

> The "Apportionment Factor" shall be in the product of the averaging of the total of the following percentages:
>
> (i) Wages, salaries, commissions, and other compensation in Township, as a percentage of other total wages, salaries, commissions, and other compensation.
>
> (ii) Receipts in Township as a percentage of total receipts.
>
> (iii) Value of the tangible personal and real property owned or leased and situated within the Township as a percentage of total tangible personal and real property owned or leased.

Id. at 74a-75a.

2. Northwood's Business Privilege Tax Dispute

Respondent, Northwood Construction Company ("Northwood"), performs construction management and general contracting services for projects in Pennsylvania and neighboring states. *Id.* at 2a. Northwood's principal place of business and sole office is in Upper Moreland; it also maintains temporary trailers at various construction sites. See also *id.* at 4a.

Northwood filed tax returns with Upper Moreland for the years 1995 through 1998 reporting as its gross receipts that portion of its gross receipts that was purportedly attributable to Northwood's business activities in Upper Moreland. *Id.* at 2a. Northwood paid a BPT in 1995 and 1996, but in 1997 and 1998 it made no BPT payment and asserted that it was due a refund for overpayments of the

BPT in prior years. *Ibid.* Specifically, Northwood claimed that in 1995 and 1996, Upper Moreland had, *inter alia*, erroneously imposed the BPT on 100% of Northwood's gross receipts, including those derived from out-of-state activities. *Id.* at 2a-3a. Upper Moreland denied Northwood's refund claims and claimed that Northwood had underpaid the BPT. *Id.* at 3a.

Consistent with the Exclusionary Provision, Upper Moreland excluded from the receipts subject to the BPT those receipts from other Pennsylvania municipalities to which Northwood had paid business privilege or similar taxes. *Id.* at 7a n.5. Also consistent with the Exclusionary Provision, Upper Moreland did not exclude any receipts from other states because Northwood did not pay any "business privilege tax or similar tax" on any such receipts. *Id.* at 27a n.18. Moreover, because Northwood did not have places of business in more than one state, the BPT Ordinance's Allocation Regulations were not applicable to any of Northwood's gross receipts. *Id.* at 23a n.13; 74a.

B. Procedural History

The trial court granted summary judgment for Upper Moreland, finding in part that the BPT satisfied the four-part test set forth in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), and therefore did not violate the Commerce Clause. App., *infra*, 52a-54a. Thus, the court held that the BPT: (1) was applied to an activity with a substantial nexus with the taxing state; (2) was fairly apportioned; (3) did not discriminate against interstate commerce; and (4) was fairly related to the services provided by the taxing state. *Id.* at 53a-54a. The trial court

also found, *inter alia*, that Northwood's temporary on-site trailers did not constitute out-of-state offices that would trigger the Allocation Regulations. *Id.* at 54a n.2. Accordingly, the court concluded that gross receipts generated from construction sites outside Pennsylvania are subject to the BPT. *Id.* at 54a-55a.

The Commonwealth Court of Pennsylvania affirmed the trial court's ruling in all respects. *Id.* at 44a. Recognizing that a tax must be both "internally consistent" and "externally consistent" to satisfy the fair apportionment prong of the *Complete Auto* test, *id.* at 40a, the Commonwealth Court specifically found that the BPT was externally consistent because it

> taxes only that portion of a company's revenues from interstate activity that reasonably reflects the company's maintenance of a permanent business office in [Upper Moreland]. In other words, [Upper Moreland] can justify a tax on the privilege of maintaining an office within [Upper Moreland] where, from that office, a company is able to manage, direct and control *all* of its interstate business activities.

Id. at 42a (citation omitted).

The Supreme Court of Pennsylvania reversed the Commonwealth Court's decision only insofar as it affirmed that the BPT was externally consistent. *Id.* at 2a, 26a-31a. As this Court has stated, external consistency looks "to the economic justification for the State's claim upon the value taxed, to discover whether a State's tax reaches beyond that portion of value that is fairly attributable to economic activity within the taxing State." *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175 (1995). Therefore, the Court will find that a tax violates the Commerce Clause

only if the taxpayer can prove "by 'clear and cogent evidence' that the income attributed to the State is in fact 'out of all appropriate proportion to the business transacted * * * in that state,'" *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 274 (1978) (quoting *Hans Rees' Sons, Inc. v. North Carolina ex rel. Maxwell*, 283 U.S. 123, 135 (1931)), "or has 'led to a grossly distorted result,'" *id.* (quoting *Norfolk & Western R.R. Co. v. State Tax Comm'n*, 390 U.S. 317, 326 (1968)). See also *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 170 (1983); App., *infra*, 26a-27a.

The court below concluded that "Northwood adequately established that income attributed to [Upper Moreland] is 'out of all appropriate proportion to' the business transacted in the Township and has no 'rational relationship' to Northwood's business in the Township." App., *infra*, 27a. Rejecting the Commonwealth Court's reasoning that Upper Moreland may tax all of Northwood's interstate receipts because Northwood manages, directs, and controls all its interstate activities from its Upper Moreland office, the Supreme Court of Pennsylvania ruled that Upper Moreland must allocate Northwood's receipts among the states in which those activities occur. *Id.* at 30a-31a.

Despite having acknowledged in its internal consistency analysis that the Allocation Regulations by their terms apply only to taxpayers with multi-state offices, see *id.* at 22a-23a, the court in its external consistency analysis disregarded Upper Moreland's adherence to the Applicability provision of the Allocation Regulations. Indeed, the court found that Upper Moreland "imposed its BPT on 100% of Northwood's receipts from interstate commerce, ***without making any attempt to allocate those***

receipts for in-state versus out-of-state activity. *Id.* at 27a (emphasis added).

REASONS FOR GRANTING THE PETITION

A. This Court's Review Is Needed To Bring Coherence To The Requirements Mandated By The Dormant Commerce Clause For Gross Receipts Taxes

Although this Court in numerous cases has sanctioned taxes on unapportioned gross receipts from interstate activities, the decision below invalidated such a tax by stretching too far an analogy drawn by this Court in upholding an unapportioned ***sales*** tax in *Jefferson Lines*. There, this Court distinguished an Oklahoma sales tax on interstate bus travel from the New York gross receipts tax on interstate bus travel at issue in *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653 (1948), by analogizing the New York tax to "a variety of a tax on income, which was required to be apportioned to reflect the location of the various interstate activities by which it was earned." *Jefferson Lines*, 514 U.S. at 190. Thus, despite the "striking" similarity of the two taxes, the Court upheld the sales tax, even though it had struck down the gross receipts tax, based on the identity of the taxpayer – in *Central Greyhound*, the seller; in *Jefferson Lines*, the buyer – and the "arguably local character of the levy on the sales transaction." *Id.* at 189, 190. *Jefferson Lines* did not, however, suggest that the Court's *Central Greyhound* analogy implied anything about gross receipts taxes on other business activities.

Nevertheless, the Pennsylvania Supreme Court and other state courts have read this *Jefferson Lines* sales tax analysis so broadly as to call into question the validity of an entire line of this Court's cases specifically upholding unapportioned gross receipts taxes.[1] See App., *infra.*, 28a-29a (holding that the BPT was internally consistent but relying on the *Jefferson Lines* analysis to find that it was not externally consistent); see also *City of Winchester v. Am. Woodmark Corp.*, 471 S.E.2d 495, 497-99 (Va. 1996) (citing *Jefferson Lines* in finding that undisputedly internally consistent gross receipts tax was nevertheless not externally consistent); *S. Pac. Transp. Co., Inc. v. Arizona*, 44 P.3d 1006, 1012-15 (Ariz. Ct. App. 2002) (relying on *Jefferson Lines*'s *Central Greyhound* analogy to find a transaction privilege tax internally but not externally consistent). By thus seizing on an apparent ambiguity in *Jefferson Lines*, these courts eschewed this Court's decisions in, among other cases, *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*, 483 U.S. 232, 251 (1987) (rejecting out-of-state manufacturer's fair apportionment challenge to unapportioned gross receipts tax on sales to an in-state customer despite fact that "the value of the wholesale transaction is partly attributable to the manufacturing activity carried on in another state"), *Standard Pressed Steel Co. v. Washington Department of Revenue*, 419 U.S. 560 (1975) (upholding Washington's

[1] These cases have also brought to light a blurred distinction between the external and internal consistency tests. See, e.g., Jesse H. Choper, *State Taxation & The Dormant Commerce Clause: The Object-Measure Approach*, 1998 SUP. CT. REV. 193, 199 (noting that the finding of external consistency in *Jefferson Lines* – on the grounds that the buyer could not be subjected to double taxation – was based on the same principles invoked by the internal consistency analysis).

unapportioned gross receipts tax on sales made by out-of-state supplier where supplier's only activities in Washington were its Seattle-based representative's contacts with customer), *Department of Treasury v. Ingram-Richardson Manufacturing Co.*, 313 U.S. 252 (1941) (upholding unapportioned tax on gross receipts from sale of services performed within state upon tangible property obtained from and delivered to out-of-state customers), and *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938) (sustaining unapportioned tax on gross receipts from sale of advertising space where advertising contracts were entered across state lines and their performance required out-of-state distribution of magazines).

Because *Jefferson Lines* itself did not cast aside this line of cases, the decision below and other state court cases involving gross receipts taxes in the wake of *Jefferson Lines* have muddled the law governing the fair apportionment requirements for such taxes. This Court's review is needed to clarify that its *Jefferson Lines* decision was not intended to turn the negative Commerce Clause into a magic talisman that a taxpayer could invoke against its own municipality to avoid taxation simply by proclaiming "interstate commerce." As this Court has stated, "[i]t was not the purpose of the commerce clause to relieve those engaged in interstate commerce of their just share of the state tax burden even though it increases the cost of doing business." *Western Live Stock*, 303 U.S. at 254.

B. The Decision Below Conflicts With This Court's Decisions Leaving Taxing Authorities Broad Discretion To Establish Apportionment Formulas

By ignoring the full text of Upper Moreland's Allocation Regulations (*i.e.*, not considering the Applicability provision), the Supreme Court of Pennsylvania stripped Upper Moreland of the "wide latitude" that this Court has repeatedly confirmed that local taxing authorities may exercise in fashioning such regulations. *Moorman*, 437 U.S. at 274 (noting the "basic principle" that "the States have wide latitude in the selection of apportionment formulas"). Inherent in the court's holding that Northwood met its burden for invalidating the BPT was the court's position that essentially required Upper Moreland to rewrite its Allocation Regulations to remove the Applicability provision.

The decision below thus contravenes this Court's "reject[ion of] the idea that a particular apportionment formula must be used simply because it would be possible to use it. [This Court has] never required that any particular apportionment formula or method be used * * * ." *Jefferson Lines*, 514 U.S. at 195 (finding unapportioned sales tax on interstate bus travel externally consistent despite taxpayer's argument that state "could feasibly apportion its sales tax on the basis of mileage").

Dealing with the "vexed question" of apportionment, *Western Live Stock*, 303 U.S. at 254; see also *Jefferson Lines*, 514 U.S. at 182, 184, and particularly with the "less tidy world of real taxation," *id.*, 514 U.S. at 185, at issue in an external consistency analysis – as opposed to the theoretical analysis mandated by the internal consistency requirement – this Court has seen fit to defer to local governments' legislative authority. Indeed, this Court has

stated that it has "'long held that the Constitution imposes no single [apportionment] formula on the States,' and therefore [has] declined to undertake the essentially legislative task of establishing a 'single constitutionally mandated method of taxation.'" *Goldberg v. Sweet*, 488 U.S. 252 (1989) (quoting *Container Corp.*, 463 U.S. at 164, 171) (citation omitted). Yet, the Pennsylvania Supreme Court took precisely such a legislative role in rejecting Upper Moreland's Allocation Regulations.

Moreover, while that court correctly noted that the external consistency analysis focuses on the threat of multiple taxation, see App., *infra*, 29a-30a, "[t]he Constitution does not 'invalidate an apportionment formula whenever it *may* result in taxation of some income that did not have its source in the taxing State.'" *Container Corp.*, 463 U.S. at 169-70 (quoting *Moorman*, 437 U.S. at 272). See also *Jefferson Lines*, 514 U.S. at 185 (noting that "the threat of real multiple taxation * * * ***may*** indicate a State's impermissible overreaching"). The fact that Northwood was ***not*** subject to multiple taxation, and could not be given the Exclusionary Provision, App., *infra*, 25a; 27a n.18; 60a-61a, viewed together with the lower courts' findings that Northwood manages, directs, and controls all its interstate activities from its Upper Moreland office, further illustrates that the Pennsylvania Supreme Court disregarded this Court's decisions in invalidating Upper Moreland's BPT.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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JANUARY 2005

APPENDIX A

[J-121-2003]

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

NORTHWOOD CONSTRUCTION COMPANY,
Appellant,
v.
TOWNSHIP OF UPPER MORELAND,
Appellee.

12 M.D. Appeal Docket 2003

Appeal from the Order of the Commonwealth Court entered July 19, 2002 at 2853 C.D. 2001, affirming the Order of the Court of Common Pleas of Montgomery County entered November 15, 2001 at No. 99-13429

802 A.2d 1269 (Pa. Commw. 2002)

ARGUED: October 20, 2003.

BEFORE: CAPPY, C.J., and CASTILLE, NIGRO, NEWMAN, SAYLOR, EAKIN and LAMB, JJ.

OPINION

MR. JUSTICE NIGRO Decided: September 2, 2004

We granted allowance of appeal in this case to consider whether the Commonwealth Court erred in concluding that Appellee Township of Upper Moreland (the "Township") could impose a Business Privilege Tax ("BPT") on 100% of the gross receipts of Appellant Northwood Construction Company ("Northwood"), which is located in the Township but performs a substantial amount of work outside of the Township. For the following reasons, we conclude that the court erred insofar as it found that the

Township's taxation of receipts generated from Northwood's out-of-state work did not violate the Commerce Clause of the United States Constitution, and therefore reverse that portion of the Commonwealth Court decision. In all other respects, we affirm.

Northwood is a business corporation with its principal place of business in the Township. Its primary business activities are construction management and general contracting, and it conducts those activities throughout Pennsylvania as well as in Delaware, New Jersey and Maryland.

The Township has a Business Privilege Tax Ordinance (the "Ordinance"), which imposes a Business Privilege Tax ("BPT") on any person "engaging in a business . . . in the Township." Ordinance § 1.04. The amount of the BPT is 3.5 mills (.0035) on the gross receipts of the business, subject to certain specified exclusions, including an exclusion for gross receipts on which a "business privilege tax or similar tax has been imposed by another political subdivision by reason of the performance of the service or conducting the business in that political subdivision." *Id.* § 1.02(f)(4) (the "Exclusionary Provision").

Northwood filed tax returns with the Township for the years 1995, 1996, 1997 and 1998. In those returns, Northwood reported as taxable gross receipts that portion of its gross receipts that were attributable to its business activity in the Township. It also paid a BPT in connection with its 1995 and 1996 returns, but it made no BPT payment in 1997 and 1998, asserting that it was due a refund for overpayments of the BPT in prior years. Specifically, Northwood claimed that in 1995 and 1996, the Township had erroneously imposed a BPT on (1) gross

receipts from certain in-state activities outside of the Township that the Township could not tax, as well as (2) 100% of the gross receipts derived from out-of-state activities. The Township, however, not only denied Northwood's refund claims, but also took the position that Northwood had *underpaid* the BPT in all four years at issue and demanded an additional BPT payment of $257,579.52 plus interest and penalties.

To resolve this dispute, Northwood filed a civil action in the trial court, seeking to recover the BPT it claimed to have overpaid. The Township, in turn, filed a counterclaim, asking the trial court to award it the $257,579.52 that it claimed Northwood still owed for the tax years in question. Northwood and the Township subsequently filed cross-motions for summary judgment. In conjunction with those motions, the parties filed two stipulations of facts and also certified that there were no material facts in dispute and that their dispute could therefore be resolved as a matter of law. After oral argument, the trial court denied Northwood's motion and granted the Township's motion, awarding the Township the $257,579.52 plus penalties and interest that it had requested.

On appeal, the Commonwealth Court affirmed. *Northwood Construction Co., Inc. v. Township of Upper Moreland*, 802 A.2d 1269 (Pa. Commw. 2002). In its opinion, the court first rejected Northwood's argument that applying the BPT to gross receipts generated from activities outside the Township violated the Ordinance. As the court explained, the plain language of the Ordinance provides that the Township will impose the BPT on any entity "engaging in a business ... in the Township," Ordinance § 104, and states that the Township will calculate the BPT on the entity's gross receipts, which it defines

as "cash, credits, property of any kind or nature, received or allocable or attributable to any business" of the entity. *Id.* § 102(f). While Northwood contended that these two Ordinance provisions together convey that only the gross receipts *generated from business in the Township* are subject to the BPT, the court disagreed, emphasizing that the Ordinance's definition of gross receipts subject to the BPT is not so limited, but rather provides for the taxation of income "attributable to *any* business" of the taxed entity. *Id.* (emphasis added).

The Commonwealth Court next addressed Northwood's argument that receipts attributable to its on-site trailers at construction sites outside the Township should be excluded from the BPT, because those trailers constituted "*bona fide* offices" and this Court's decision in *Gilberti v. City of Pittsburgh*, 511 Pa. 100, 511 A.2d 1321 (1986), established that a municipality cannot impose a BPT on receipts attributable to *bona fide* offices outside of the municipality.[1] However, the court rejected this argument, explaining that *Gilberti* involved a tax ordinance that specifically provided that income from *bona fide* offices outside of the municipality would be excluded from

[1] Northwood maintains that its trailers constitute *bona fide* "field offices," essentially because they (1) have telephone, fax and utility services, copier facilities, and restroom facilities, (2) are used by Northwood employees for employee meetings as well as for meetings with customers, subcontractors, and vendors, (3) house job records, drawings, specifications schedules, and employee records for employees working the site, and (4) are subdivided into three separate offices/conference rooms. Northwood Brf. at 2-3 (citing Second Stipulation of Facts at ¶¶ 8-14). Moreover, Northwood points out that at each site, it employs full time on-site personnel to conduct the daily operations required to manage the construction activity. *Id.* at 3 (citing Second Stipulation of Facts at ¶ 15).

the municipality's BPT and as such, in no way established a general rule that receipts from *bona fide* offices outside a municipality can *never* be taxed by the home municipality. Moreover, it noted that the Township's Ordinance contains no *bona fide* office provision and thus, no such limitation applies in the instant case. *Northwood Construction Co.*, 802 A.2d at 1273 ("[T]he Pittsburgh ordinance [at issue in *Gilberti*] and the Pittsburgh regulations, which contain provisions dealing with *bona fide* offices, are not relevant here."). The court reiterated that the Ordinance provides that the Township will not tax receipts for which a BPT is paid to another political subdivision, Ordinance § 1.02(f)(4) (no taxation of receipts for which a "business privilege tax or similar tax has been imposed by another political subdivision"), and noted that, in certain instances, this could exempt receipts that were generated from a taxpayer's *bona fide* office outside the Township. However, the court made clear that there was no basis on which Northwood could argue that the Ordinance prohibits the taxation of *all* receipts generated from *bona fide* offices outside the Township in the absence of a *Gilberti*-style *bona fide* office provision.[2]

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[2] The court also commented that *G.A. & F.C. Wagman, Inc. v. Manchester Twp.*, 112 Pa. Cmwlth. 357, 535 A.2d 702, 704 (1988), involved a Manchester County ordinance that excluded from Manchester Township's BPT all receipts associated with an "office . . . regularly maintained by the taxpayer, outside the limits of the [township]," and then hypothesized how that ordinance would affect Northwood if it were applied in the Township. Stating that it held in *G.A. & F.C. Wagman* that the Manchester Township BPT exclusion applied only to receipts from *permanent* offices outside of the township, and noting that Northwood's construction site trailers were *temporary* rather than *permanent* offices, it concluded that even if the Manchester ordinance exclusion were applicable in the Township, such an exclusion would not provide Northwood with the tax relief it sought.

The Commonwealth Court also rejected Northwood's argument that the Township could not tax 100% of its gross receipts because the Commonwealth Court's prior decision in *Township of Lower Merion v. QED, Inc.*, 738 A.2d 1066 (Pa. Commw. 1999), established that section 8 of the Local Tax Enabling Act (the "LTEA"),[3] 53 P.S. § 6908, allows for a BPT exemption where a company has more than one base of operations. The court explained that *Township of Lower Merion* merely states that "Section 8 of the LTEA . . . has been interpreted by the courts to provide that the taxpayer must receive a credit for gross receipts taxes *paid* to another municipality where the base of operations exists and from receipts generated by that office." 802 A.2d at 1274 (alteration in original) (quoting *Township of Lower Merion*, 738 A.2d at 1071 n.6).[4] As the Township had exempted from taxation any of Northwood's gross receipts that had been taxed in another political

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[3] Act of December 31, 1965, P.L. 1257, 53 P.S. §§ 6901-6924.

[4] In support of this statement regarding how the courts have interpreted section 6908, the *Township of Lower Merion* court cited to *Gilberti* and the Commonwealth Court opinion in *Airpark Int'l I v. Interboro School District*, 677 A.2d 388 (Pa. Commw. 1996), *aff'd* 558 Pa. 1, 735 A.2d 646 (1999) (plurality). However, *Gilberti* did not even mention section 6908, much less analyze its provisions. In contrast, the Commonwealth Court's *Airpark Int'l* decision does discuss section 6908, but it also indicates that the provision's effect is much more limited than *Township of Lower Merion* suggests. *See Airpark Int'l*, 677 A.2d at 394-96 (explaining, among other things, that section 6908 primarily addresses caps on tax *rates* and applies only to certain specified types of taxes). In any event, Northwood has not developed any meaningful argument regarding section 6908 in its brief to this Court, *see* Northwood Brf. at 38 (only briefly referencing section 6908 and *Township of Lower Merion*), and thus, we will not address that section further in this opinion.

subdivision within Pennsylvania,[5] the court concluded that the Ordinance was completely in accord with section 8 of the LTEA as interpreted in *Township of Lower Merion.*

The Commonwealth Court next turned to Northwood's argument that the Township's taxation of 100% of the receipts generated from Northwood's construction sites in New Jersey, Delaware and Maryland violated the Commerce Clause of the United States Constitution.[6] As an initial matter, the court rejected Northwood's contention that the tax violated the constitutional mandate of fair apportionment, which requires both "internal consistency" and "external consistency." According to the court, the tax was "internally consistent," *i.e.,* it would not result in more than one state taxing the same portion of income if it were applied in every state, because the Township had promulgated regulations requiring the apportionment of receipts for taxpayers "engaged in interstate commerce, having places of business in more than one State."[7] *Northwood*

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[5] The parties stipulated that "Northwood paid a privilege tax or similar tax to certain jurisdictions within Pennsylvania, such as Bensalem, Philadelphia, and Warminster, and the Township has excluded receipts from those jurisdictions for purposes of computing Northwood's receipts subject to the BPT." Second Stipulation of Facts at ¶ 20, R.R. 11a.

[6] The Commerce Clause states that "Congress shall have Power . . . [t]o regulate Commerce with foreign nations, and among the several States. . . ." U.S. CONST., art. I, § 8, cl. 3.

[7] The Township promulgated these regulations pursuant to section 1.02(f)(9) of the Ordinance, which provides that:

> The [Business Tax Office of the Township] shall promulgate rules and regulations setting forth methods of allocation of gross receipts for such cases where the gross receipts of a business in its entirety are not subject to tax imposed by this Ordinance by reason of the provision of the Commerce

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Construction Co., 802 A.2d at 1275; *see also* Regulations under Article I, "Business Privilege Tax," Chapter 7, Title 2, Upper Moreland Township Code Providing for the Allocation of Gross Receipts in the Case of Businesses with Multi-State Offices Engaged in Interstate Commerce ("Regulations"), Northwood Brf., Exh. G. The court also held that the tax was "externally consistent," *i.e.*, it did not tax more than that portion of the revenues from the interstate activity which reasonably reflected the in-state component of the activity being taxed. In so holding, the court explained that "the Township can justify a tax on the privilege of maintaining an office within the Township where, from that office, a company is able to manage, direct and control *all* its interstate business." 802 A.2d at 1276 (emphasis in original).

The Commonwealth Court also rejected Northwood's claims that the tax violated the Commerce Clause (1) by providing a direct commercial advantage to local business and (2) because there is no fair relation between the tax and the benefits conferred upon the taxpayer by the state. With respect to the former, the court stated that the tax did not impose a greater burden on out-of-state activities than it did on in-state activities not only because the millage rate for in-state and out-of-state activities was the same, but also because any time another state imposed a BPT on the taxpayer's receipts, the Township Regulations ensured that the taxed receipts would be allocated to that other state and the Township would exclude those receipts from its tax. *See* Regulations. With respect to the latter

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Clause of the United States Constitution or under the Constitution of the Commonwealth of Pennsylvania.

Ordinance § 1.02(f)(9).

argument, the court explained that there *was* a fair relation between the tax and the in-state activities because "[a]long with the privilege of maintaining its office in the Township, Northwood enjoys certain governmental services." 802 A.2d at 1276.

On appeal to this Court, Northwood asserts that the Commonwealth Court erred in concluding that (1) the Ordinance, by its terms, permits the imposition of the BPT on gross receipts from activities performed outside the Township, and (2) the imposition of such a tax was within the Township's authority under the LTEA. It further asserts that the Commonwealth Court erred in concluding that the Township's imposition of the BPT on 100% of its out-of-state receipts did not violate the Commerce Clause.

Addressing each of these arguments in turn, we first reject Northwood's assertion that the Ordinance, by its terms, does not permit the Township to tax its gross receipts from activities performed outside the Township. As the Commonwealth Court noted, section 1.04 of the Ordinance provides that:

> Every person engaging in a business, trade, occupation, profession or vocation in the Township shall pay an annual Business Privilege Tax for the tax year at the rate of three and one-half (3.5) mills *on his gross receipts,* provided no tax will be levied on any person who has registered with the Township and whose gross receipts are Two Thousand Nine Hundred Dollars ($2,900.00) or less, provided that a tax return is filed.

Ordinance § 1.04 (emphasis added). The Ordinance further defines "gross receipts" as:

> [C]ash, credits, property of any kind or nature, received or allocable or attributable to *any* business, or services rendered, or commercial or business transactions without deduction therefrom on account of the cost of property sold, material used, labor, service or other costs, interest, or discount paid, or any other expense.

Ordinance § 1.02(f) (emphasis added).

Northwood argues that these provisions only authorize the Township to tax "gross receipts allocable or attributable to any business *conducted within the Township.*" Northwood Brf. at 27 (emphasis added); *see also id.* ("By it own terms, the Ordinance only imposes tax upon cash or credits 'allocable or attributable' to any business or services rendered in the Township."). However, like the Commonwealth Court, we are at a loss to discern Northwood's suggested meaning from the plain terms of the statute. While the Ordinance is clear that it only permits taxation of entities that conduct business in the Township, *see* Ordinance § 1.04, it also plainly provides that, once it is determined that the entity *does* conduct business in the Township, the amount of the tax may be calculated on the "gross receipts" attributable to "*any* business" of the entity. *Id.* § 1.02(f) (emphasis added). Moreover, while the Ordinance excludes from "gross receipts" any receipts on which the taxpayer has already paid a BPT or similar tax to another political subdivision, *see id.* § 1.02(f)(4), this Exclusionary Provision is not broad enough to shield from taxation all receipts "allocable or attributable" to business outside the Township, because it is dependent upon whether or not the other subdivisions choose to impose a tax, and if so, whether that tax can be characterized as "a [BPT] or similar tax." *Id.* As such, in spite of the Exclusionary

Provision, the Ordinance plainly provides that the BPT is calculated on at least certain "gross receipts" without reference to where they are generated and thus, Northwood's argument to the contrary is meritless.

Northwood next contends that even if the intent of the Ordinance is to impose the BPT on gross receipts generated by business activity outside the Township, any such tax exceeds the Township's authority under the LTEA and is therefore unenforceable. Again, we disagree.

"In Pennsylvania, the power to tax is statutory and must be derived from an enactment of the General Assembly." *Independent Oil and Gas Ass'n of Pennsylvania v. Board of Assessment Appeals of Fayette County*, 572 Pa. 240, 814 A.2d 180, 182 (2002). The extent to which the Township may implement a BPT is set forth in section 6902 of the LTEA, which provides in pertinent part that political subdivisions:

> may, in their discretion, by ordinance or resolution, for general revenue purposes, levy, assess and collect or provide for the levying, assessment and collection of such taxes as they shall determine on persons, transactions, occupations, privileges, subjects and personal property within the limits of such political subdivisions. . . .

53 P.S. § 6902.

In *Gilberti v. City of Pittsburgh*, 511 Pa. 100, 511 A.2d 1321, this Court considered the extent of a municipality's taxing power under section 6902. In that case, the City of Pittsburgh (the "City") imposed a BPT on a Pittsburgh-based architectural firm (the "Firm") pursuant to the Pittsburgh Code (the "Code"), which stated that "[e]very person engaging in any business in the City shall pay an

annual tax ... on each dollar of volume of the gross annual receipts thereof." 511 A.2d at 1323 (quoting Pittsburgh Code § 243.02). The Firm took issue with the City's application of the tax to receipts generated from services performed outside the City, such as on-site supervision of construction projects outside the City limits.[8] Specifically, the Firm asserted that such taxation exceeded the City's authority under the LTEA to tax "transactions" and "privileges" that are "within the limits" of the City. 53 P.S. § 6902. This Court agreed that "out-of-City transactions are not transactions within the City, and the LTEA has conferred power upon the City to tax only transactions 'within the limits' of the City." 511 A.2d at 1324. Accordingly, we refused to sustain the tax at issue "as an exercise of the City's power to tax 'transactions.'" *Id.* However, we disagreed with the Firm that the City could not tax receipts from services performed outside the City pursuant to its power under the LTEA to tax "privileges" that are "within the limits" of the City. We acknowledged that "where the City imposes a tax upon a privilege, the tax cannot be levied directly upon exercises of the privilege that occur outside of the taxing district." *Id.* at 1325. We further recognized that the tax at issue "operate[d] in such a manner as to, in effect, tax revenues from certain transactions that occur wholly outside the City." *Id.* at 1326. Nevertheless, we explained that the "tax remains one that is levied only upon a *privilege* exercised within the City, to wit maintenance of a business office, and the fact that the amount of tax is dependent upon the taxpayer's gross

[8] Notably, there was no claim in *Gilberti* that the City's tax violated the Commerce Clause as none of the receipts at issue apparently arose out of interstate commerce. *See id.* at 1325.

receipts, including receipts from services performed outside the City, does not undermine the legitimacy of the tax." *Id.* (emphasis added). We went on to explain that:

> In support of this conclusion it is to be emphasized that the plain language of the Enabling Act provides for taxes to be levied upon privileges within the City. In enacting such a provision, the legislature surely recognized that the exercise by a taxpayer of the privilege of doing business within a taxing jurisdiction constitutes far more than the sum of individual transactions and activities which are consummated or performed within the territorial limits of the taxing entity. Indeed, having a place of business within the City enables the taxpayer to have a base of operations from which to manage, direct, and control business activities occurring both inside and outside the City limits. Further, the in-City office provides a place from which to solicit business, accept communications, conduct meetings, store supplies, and perform office work. All of these activities are, in the usual course, necessary to any business operation. This is so irrespective of whether the business performs services at job sites outside of the City.

Id. at 1326. As such, we specifically concluded that "the legislature has provided for the City to collect a tax upon the privilege of having a place of business in the City" and that "the measure of that tax is not to be so limited as to ignore the contribution to out-of-City activities provided by maintaining a base of operations within the City." *Id.*

Under this analysis, it is clear that the Township's imposition of its BPT on gross receipts generated from business activity outside the Township did not run afoul of

the LTEA. Like the Firm in *Gilberti,* Northwood maintains its principal place of business within the taxing jurisdiction. While the taxation of Northwood's gross receipts "operates in such a manner as to, in effect, tax revenues from certain transactions that occur wholly outside of the [Township]," such a tax, as we stated in *Gilberti,* "remains one that is levied only upon a privilege exercised within the City, to wit, maintenance of a business office and the fact that the amount of tax is dependent upon the taxpayer's gross receipts, including receipts from services performed outside the [Township], does not undermine the legitimacy of the tax." *Id.* at 1326. Thus, just as we found with respect to the ordinance in *Gilberti,* the Ordinance here is a legitimate exercise of the Township's power under the LTEA to tax Northwood for the privilege of maintaining a principal place of business in the Township, which it could use to "solicit business, accept communications, conduct meetings, store supplies, and perform office work" and from which it could "manage, direct, and control business activities occurring both inside and outside the City limits." *Id.*

Northwood nevertheless argues that the LTEA does not empower the Township to impose the BPT on receipts generated from work outside of the Township, because unlike the situation in *Gilberti,* Northwood's activities within the Township do not significantly contribute to that out-of-Township work.[9] Specifically, Northwood contends

[9] This argument appears at the very end of Northwood's brief, almost as an afterthought. *See* Northwood Brf. at 37. Nevertheless, it is Northwood's only argument that even attempts to explain why the language of the LTEA should be interpreted as empowering Pittsburgh to enact the taxation scheme at issue in *Gilberti,* but not empowering the Township to enact the BPT at issue here.

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that unlike the Firm in *Gilberti,* it maintains offices outside the Township, namely its temporary on-site trailers at construction sites, from which it exercises primary control over its out-of-Township activities. It therefore reasons that while the Firm's control over out-of-City activities from its central office in *Gilberti* may have been sufficient under the LTEA to justify the imposition of a BPT on the receipts generated from the Firm's out-of-City

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Northwood's primary argument regarding *Gilberti* is that it is not controlling here because the Ordinance is "not nearly as expansive as the [*Gilberti*] ordinance." Northwood Brf. at 32. However, we fail to see how this argument works in Northwood's favor. As an initial matter, we have already rejected Northwood's factual premise that unlike the *Gilberti* ordinance, the Ordinance here only permits the Township to tax those receipts allocable or attributable to business conducted within the Township. *See supra* pp. 8-9. Moreover, even assuming *arguendo* that Northwood was correct that the Ordinance here is "not nearly as expansive as the [*Gilberti*] ordinance," Northwood Brf. at 32, that fact would make it *more* likely that the Township had power under the LTEA to enact the Ordinance, not less so. Accordingly, Northwood's argument in this regard is simply meritless.

Northwood goes on to argue that if we conclude that *Gilberti* is relevant to our analysis as to the scope of the Township's powers under the LTEA, we should find that the trailers Northwood maintains on its construction sites are *bona fide* offices and that the receipts from those trailers are therefore subject to an exemption under the *Gilberti* ordinance. However, this argument again misses the mark. Simply put, our reliance on *Gilberti* in concluding that the Township's enactment of the BPT at issue here was within the scope of its authority under the LTEA has nothing to do with the text of the ordinance in *Gilberti* and in no way rests on a conclusion that the text of the *Gilberti* ordinance is applicable here. Rather, we merely reiterate that, pursuant to *Gilberti*: (1) the LTEA authorizes a municipality to tax a business whose principal office is within its borders for the *privilege* of maintaining that office within the municipality, and (2) the measure of that tax can include receipts from work outside the municipality, based on a recognition that the maintenance of "a base of operations" within the municipality contributes to a business's ability to conduct activities outside of the municipality. 511 A.2d at 1326.

activities, the very limited control that Northwood exercises over out-of-Township activities from its Township office does not justify such a sweeping BPT.

However, *Gilberti's* conclusion that the LTEA empowered the City to tax the Firm's out-of-City receipts did not, as we read the decision, hinge on the fact that the Firm did not have any other offices outside of the City. Rather, it was grounded on the understanding that the Firm's central office provided a "base of operations" from which it exercised control over its operations. *Gilberti*, 511 A.2d at 1326. Moreover, we agree with the Commonwealth Court in *G.A. & F.C. Wagman* that the supervision of projects from temporary on-site offices simply "does not negate the fact that the root of all of the company's business is at its sole permanent business headquarters."[10] 535 A.2d at 705-06. As such, we reject Northwood's attempt to characterize its "privilege" of maintaining a Township office as somehow less meaningful than the Firm's "privilege" of maintaining a City office in *Gilberti* and therefore reject its assertion that *Gilberti* does not support a conclusion that

[10] *G.A. & F.C. Wagman* involved a highway construction company that had its sole permanent office in Manchester Township, Pennsylvania, but performed the majority of its business outside of Manchester Township. Furthermore, individual projects of the company were "often supervised by temporary on-site offices," "many employees ha[d] little or no direct contact with the home office, and payments for services [were] often received outside the township." 535 A.2d at 705. In spite of these factual distinctions between the case and *Gilberti*, the court concluded that *Gilberti* was controlling because, as stated above, the factual differences did not "negate the fact that the root of all of the company's business [was] at its sole permanent business headquarters." *Id.* at 705-06.

its out-of-Township receipts are subject to the Township's BPT.[11]

Furthermore, we find significant here that the Ordinance contains the Exclusionary Provision, which provides that the Township will exclude from taxable gross receipts any receipts on which the taxpayer has already paid a BPT or similar tax to another political subdivision based on the taxpayer's performance of a service or conduct of business in that subdivision. Ordinance § 1.02(f)(4). Essentially, this provision ensures that to the extent that a taxpayer is exercising the privilege of conducting business in another political subdivision, and that other political subdivision concludes that the exercise of that privilege is sufficient to justify a BPT on the taxpayer's gross receipts from activity within its boundaries, *see Township of Lower Merion*, 738 A.2d at 1071 n. 6 (recognizing that business can have more than one "base of operations"), the Township will cede the right to tax those receipts to the subdivision. *See supra* n. 5 (parties' stipulation that Township has, in fact, *not* imposed its BPT on receipts from other

[11] Northwood alternatively urges us to overrule *Gilberti* and analyze the validity of the Township's BPT on receipts from its in-state, but out-of-Township, activities based on a test similar to that utilized in ascertaining whether taxes on interstate commerce conform with the federal constitutional dictates of the Commerce Clause. However, we decline to do so for two reasons. First, we are constrained by the doctrine of *stare decisis*. *See Commonwealth v. Tilghman*, 543 Pa. 578, 673 A.2d 898, 903 n. 9 ("The rule of *stare decisis* declares that for the sake of certainty, a conclusion reached in one case should be applied to those which follow, if the facts are substantially similar, even though the parties may be different."). Second, we are simply not at liberty to ignore the text of the LTEA, which *Gilberti* was interpreting, in favor of a judicially created construct based on constitutional principles, particularly where, as here, there has been no constitutional challenge to the LTEA.

jurisdictions in the Commonwealth on which Northwood has already paid a BPT or similar tax). Thus, as a practical matter, the Township's exertion of its authority under the LTEA is limited and will not encroach upon any other political subdivision's authority or ability to tax a business functioning within its boundaries.

Having rejected Northwood's statutory claims, we turn to its contention that the Commonwealth Court erred in finding that the Township's imposition of the BPT on 100% of Northwood's interstate receipts did not violate the Commerce Clause of the United States Constitution. On this claim, we agree with Northwood that it is entitled to relief.

The United States Supreme Court has established a four-part test to be applied in ascertaining whether a state or local tax violates the Commerce Clause. *See Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed. 2d 326 (1977). Pursuant to that test, a tax will be invalidated under the Commerce Clause unless it:

1) is applied to an activity with a substantial nexus with the taxing state;

2) is fairly apportioned;

3) does not discriminate against interstate commerce; and

4) is fairly related to benefits provided by the state.

Id. at 279, 97 S.Ct. 1076. Here, Northwood does not argue that the Township's BPT applies to activities without a substantial nexus with Pennsylvania. However, it contends that the tax fails to satisfy the remaining three prongs of the *Complete Auto* test. Namely, it asserts that

the tax is not fairly apportioned, discriminates against interstate commerce, and is not fairly related to the benefits provided by Pennsylvania. As we agree that the tax is not fairly apportioned, we need not address the other two *Complete Auto* prongs on which Northwood relies.

This Court recognized in *Philadelphia Eagles Football Club, Inc. v. City of Philadelphia* that the "central purpose behind the apportionment requirement is to ensure that each state taxes only its fair share of an interstate transaction." 823 A.2d 108, 128-29 (2003) (plurality) (quoting *Goldberg v. Sweet*, 488 U.S. 252, 260, 109 S.Ct. 582, 102 L.Ed. 2d 607 (1989) (citation omitted)); *id.* at 138 (Castille, J., dissenting). As the *Philadelphia Eagles* plurality explained: "When a state taxes more than its fair share, it creates the risk that the portion of value by which it exceeded its fair share will be taxed again by a state properly laying claim to its fair share of the value being taxed, thereby subjecting the taxpayer to multiple taxation." *Id.* at 129 (citing *Oklahoma Tax Comm'n v. Jefferson Lines*, 514 U.S. 175, 184, 115 S.Ct. 1331, 131 L.Ed. 2d 261 (1995)).

In order to be "fairly apportioned," a tax must be both "internally consistent" and "externally consistent." *See Goldberg*, 488 U.S. at 260-61, 109 S.Ct. 582. A tax is internally consistent if it is "structured so that if every taxing jurisdiction were to apply the identical tax, the taxpayer would not be subjected to a risk of double taxation." *Philadelphia Eagles*, 823 A.2d at 131 (plurality) (citing *Goldberg*, 488 U.S. at 261, 109 S.Ct. 582). Thus, the internal consistency inquiry "focuses on the text of the challenged statute and hypothesizes a situation where

other States have passed an identical statute." *Goldberg*, 488 U.S. at 261, 109 S.Ct. 582.

Here, as stated above, the Ordinance authorizes the Township to impose a BPT on the gross receipts of "[e]very person engaging in a business, trade, occupation, profession or vocation in the Township." Ordinance § 1.04; *see also* § 1.02(f). "Gross receipts" are defined as any "cash, credits, property of any kind or nature, received or allocable or attributable to any business," *id.*, but exclude "[r]eceipts upon which a business privilege tax or similar tax has been imposed by another political subdivision by reason of the performance of the service or conducting of business in the political subdivision." *Id.* § 1.02(f)(4). The Ordinance also requires that the Business Tax Office in the Township "promulgate rules and regulations setting forth methods of allocation of gross receipts for such cases where the gross receipts of a business in its entirety are not subject to tax imposed by this Ordinance by reason of the . . . Commerce Clause or [the Pennsylvania Constitution]." Ordinance § 1.02(f)(9); *see* full text of provision at *supra* n.7. Here, as noted previously, the Township adopted Regulations, entitled "Regulations . . . Providing for the Allocation of Gross Receipts in the Case of Businesses with Multi-State Offices Engaged in Interstate Commerce." Those Regulations state:

> 2. *Allocation.* In the case of transactions involving interstate commerce, in conformity with the commerce clause of the United States Constitution, the apportionment of gross receipts will be made upon the following formula:

> (Receipts within Commonwealth of PA x 100%) + (Receipts without Commonwealth of PA x apportionment factor) = Gross Receipts that Tax is applied to.

Regulations at ¶ 2. Moreover, the Regulations further provide that:

> The apportionment factor shall be the product of the averaging of the total of the following percentages:
>
> (i) Wages, salaries, commissions, and other compensation in Township, as a percentage of total wages, salaries, commissions and other compensation.
>
> (ii) Receipts in Township as a percentage of total receipts.
>
> (iii) Value of the tangible property and real property owned or leased and situated within the Township as a percentage of total tangible personal and real property owned or leased.

Id.

As stated above, in assessing internal consistency, we must consider whether, if every state applied the Ordinance and the accompanying Regulations, taxpayers would be subjected to a risk of multiple taxation. Considering the Ordinance and Regulations, but *initially excluding from consideration the Ordinance's Exclusionary Provision,* it would appear that there would be such a risk.[12] Indeed,

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[12] We consider the internal consistency of the Ordinance and Regulations both with and without the Exclusionary Provision not only to emphasize the import of the Exclusionary Provision, but also because Northwood's argument that the Ordinance is internally inconsistent

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in initially providing for the taxation of *all* receipts of *any* entity that engages in *any* business in the Township, the Ordinance authorizes the Township to tax not only businesses with permanent offices in the Township, but also any businesses that come into the Township to, *inter alia,* sell products, provide services, or merely transport goods. Meanwhile, the Regulations only require the Township to apply its apportionment formula to a taxpayers' receipts, and thereby exclude certain out-of-state receipts from taxation, "in the Case of Businesses *with Multi-State Offices* Engaged in Interstate Commerce." Regulations (emphasis added); *see also* Regulations ¶ 1 (requiring that the Township apportion receipts generated by businesses "having *places of business* in more than one State") (emphasis added); Township Brf. at 20 ("[T]his regulation applies to businesses with [*bona fide*] offices or locations outside of the Township"). Thus, assuming as we must that all states have adopted this same taxation scheme, any state in which a taxpayer conducts business would only apply the Regulations' apportionment formula to exclude from taxation those receipts generated from

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largely ignores the Exclusionary Provision. Northwood apparently takes this approach because it asserts that the Township itself has largely ignored the Exclusionary Provision as it has not excluded from its BPT those receipts on which Northwood has paid taxes to other states. *See infra* n.18. However, whether or not the Township has erred in failing to provide Northwood with certain exclusions for receipts on which Northwood has paid taxes to other states, we will not follow Northwood's lead and ignore the Exclusionary Provision in our internal consistency analysis as the provision is an integral part of the Township's taxation scheme and thus, must be considered in ascertaining whether that scheme, if applied in every state, would result in multiple taxation.

activities in other states *in which the taxpayer has an office.*[13]

The risk of multiple taxation in this scheme (again, absent the Exclusionary Provision) can be exemplified by considering a hypothetical taxpayer that has a single office in Pennsylvania, but provides services in New Jersey and Delaware as well as Pennsylvania. Because the taxpayer "engages in business" in all three states, all three states could, under the universally applicable Ordinance, impose a BPT on 100% of the taxpayer's gross receipts. The Regulations would apparently require New Jersey and Delaware to apportion their tax to take into account the receipts attributable to the business office in Pennsylvania, but New Jersey would not be required to exclude from its tax the receipts generated in Delaware and likewise, Delaware would not be required to exclude the New Jersey receipts from its tax.[14] Meanwhile, the Regulations

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[13] Northwood notes that the Regulations state that the Township is to allocate receipts whenever a taxpayer has a "place of business" in another state and further asserts that its out-of-state construction trailers constitute qualifying "place[s] of business." However, the Township takes the position that the Regulations only require it to allocate a taxpayer's receipts when the taxpayer has a *bona fide* office outside of Pennsylvania and given the title of the Regulations, which refers to "Multi-State-*Offices*," we accept this interpretation for purposes of this appeal. *See* Regulations (emphasis added); Township Brf. at 20 ("Under the Trial Court's ruling that the trailers used by Northwood do not constitute bona fide offices, there was no location outside of the Township which would trigger the use of the apportionment regulations."). Of course, our acceptance of the Township's interpretation ultimately renders the Regulations more susceptible to invalidation under the Commerce Clause.

[14] It is not entirely clear under the Regulations that New Jersey and Delaware would even be required to apportion their tax, because taken at face value, the Regulations only demand that receipts for businesses with "Multi-State Offices" be allocated, *see* Regulations, and

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would not require Pennsylvania to conduct any apportionment, as the taxpayer has no offices in New Jersey or Delaware and the Regulations only require apportionment of receipts generated from *offices* in other states. Accordingly, although only Pennsylvania would tax the Pennsylvania portion of the taxpayer's receipts, the New Jersey and Delaware portions of the receipts would be taxed in *all three jurisdictions*.

It is therefore clear that if the Ordinance did not also exclude from taxable gross receipts those receipts on which the taxpayer has already paid a BPT or similar tax to another jurisdiction "by reason of the performance of the service or conducting the business in that political subdivision," Ordinance § 1.02(f)(4), it would not survive constitutional scrutiny under the internal consistency test. However, we agree with the Township that the existence of the Exclusionary Provision ultimately ensures that there is no risk of multiple taxation under the hypothetical circumstances in which internal consistency is considered. *Cf. Goldberg*, 488 U.S. at 264, 109 S.Ct. 582 (finding that provision in Illinois telecommunications tax statute that gives tax credits for taxes paid to other jurisdictions "operates to avoid multiple taxation"); Walter Hellerstein, *Is "Internal Consistency" Foolish: Reflections on an Emerging Commerce Clause Restraint on State Taxation,* 87 Mich. L. Rev. 138, 182-83 (1988) (hereinafter "Hellerstein") ("[A] tax that appears to be internally inconsistent will

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our hypothetical business has only a single office in Pennsylvania. However, whether or not New Jersey and Delaware apportioned the taxpayer's receipts pursuant to the Regulations, our analysis under the internal consistency test is essentially the same. *See infra* n.16 and accompanying text. That is, in the absence of the Exclusionary Provision, the tax would be internally inconsistent.

nevertheless pass the 'internal consistency' test if the taxing state grants a credit for taxes paid to other states on the same tax base."). Essentially, by requiring the Township to exclude from taxation receipts that are taxed by another political subdivision "by reason of the performance of the service or conducting the business in that political subdivision," the Exclusionary Provision ensures that the Ordinance, if applied in every state, would not permit two states to tax the same receipts, but rather, would only permit the state in which any given receipts are generated to tax those receipts.[15] Accordingly, adding the effect of the Exclusionary Provision to our earlier hypothetical: (1) Pennsylvania would exclude receipts from business conducted in New Jersey, as well as business conducted in Delaware, (2) New Jersey would exclude Delaware receipts in addition to the Pennsylvania receipts already excluded, and (3) Delaware would exclude New Jersey receipts in addition to the already-excluded Pennsylvania receipts.[16] In this way, applying the Ordinance and Regulations in their entirety, it is clear that no multiple taxation would occur. Thus, the Exclusionary Provision ultimately saves the Ordinance and Regulations from

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[15] If the state in which certain receipts were generated chose *not* to tax those receipts, the risk of multiple taxation would recur because under those circumstances, the other states in which the taxpayer conducted business could tax the non-taxing state's receipts, without exclusion. However, we need not be concerned with such a variation as the internal consistency test requires us to hypothesize the complete replication of the challenged state's tax in other states and thus, we must presume that all states levy and collect the taxes to which they are entitled under the tax scheme at issue.

[16] In addition, if New Jersey and Delaware had not already excluded Pennsylvania receipts pursuant to the Regulations, *see supra* n.14, they would be required to do so pursuant to the Exclusionary Provision.

unconstitutionality under the "internal consistency" prong of the fair apportionment test.

We do not reach the same conclusion when considering the "external consistency" prong of the fair apportionment test. Whether a tax is "externally consistent" is determined by applying a "subjective test that asks whether a state taxed only that 'portion of the revenues from the interstate activity which reasonably reflects the instate component of the activity being taxed.'" *Philadelphia Eagles*, 823 A.2d at 131 (plurality) (quoting *Goldberg*, 488 U.S. at 262, 109 S.Ct. 582). To determine whether a state is taxing economic activity that occurred in other jurisdictions, a court must look to the state's economic justification for its tax, *id.* (citing *Jefferson Lines*, 514 U.S. at 185, 115 S.Ct. 1331), and must ascertain whether there is a "rational relationship between the income attributed to the [s]tate and the intrastate values" of the business being taxed. *Id.* (quoting *Hunt-Wesson, Inc. v. Franchise Tax Bd. of California*, 528 U.S. 458, 464, 120 S.Ct. 1022, 145 L.Ed. 2d 974 (2000) (citations omitted)). Ultimately, the court will find that a tax violates the Commerce Clause if an objecting party "demonstrates by clear and cogent evidence that the income attributed to the state either is 'out of all appropriate proportion to the business transacted by the [taxpayer] in that state,'" *id.* (quoting *Hans Rees' Sons, Inc. v. North Carolina ex rel. Maxwell*, 283 U.S. 123, 135, 51 S.Ct. 385, 75 L.Ed. 879 (1931)), has "led to a grossly distorted result" for the taxpayer, *id.* (quoting *Norfolk & Western Ry. Co. v. Missouri State Tax Comm'n*, 390 U.S. 317, 326, 88 S.Ct. 995, 19 L.Ed. 2d 1201 (1968)), or is "inherently arbitrary" or "produced an unreasonable result," *id.* (quoting *Moorman Mfg. Co. v.*

Bair, 437 U.S. 267, 274, 98 S.Ct. 2340, 57 L.Ed. 2d 197 (1978)).

In the instant case, Northwood has adequately established that income attributed to the Township is "out of all appropriate proportion to" the business transacted in the Township and has no "rational relationship" to Northwood's business in the Township. There is apparently no dispute that Northwood engaged in interstate commerce and that a significant portion of Northwood's receipts in the relevant tax years were generated at construction sites in Delaware, New Jersey and Maryland.[17] Nevertheless, the Township has imposed its BPT on 100% of Northwood's receipts from interstate commerce, without making any attempt to allocate those receipts for in-state versus out-of-state activity.[18]

In finding that the external consistency requirement was satisfied, the Commonwealth Court merely stated as follows:

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[17] By way of example, of Northwood's nearly $35 million in gross receipts reported on its 1996 federal tax return, approximately $15.5 million were attributable to Pennsylvania, $15.4 million were attributable to New Jersey, $3 million were attributable to Delaware and $1.1 million were attributable to Maryland. *See* Stipulation of Facts at ¶ 20, R.R. 6a-7a. Similarly, of Northwood's nearly $42 million in gross receipts reported on its 1998 federal tax return, approximately $27 million were attributable to Pennsylvania, $14 million were attributable to New Jersey, and $813,000 were attributable to Delaware. *Id.*

[18] As stated above, *supra* n.12, the Township has not utilized the Exclusionary Provision to exclude from Northwood's taxable gross receipts any receipts on which taxes were paid to other states, apparently taking the position that any tax that Northwood paid on such receipts did not constitute a "business privilege tax or similar tax . . . imposed by another political subdivision by reason of the performance of the service or conducting of business in the political subdivision." Ordinance § 1.02(f)(4).

> The Township taxes only that portion of a company's revenues from interstate activity that reasonably reflects the company's maintenance of a permanent business office in the Township. In other words, the Township can justify a tax on the privilege of maintaining an office within the Township, where, from that office, a company is able to manage, direct and control *all* of its interstate business activities. *See Gilberti.*

Northwood Construction Co., 802 A.2d at 1275-76 (emphasis in original). This analysis, however, is wholly inadequate. As an initial matter, the Commonwealth Court's reliance on *Gilberti* in support of its conclusion that the tax at issue is constitutionally valid is fundamentally flawed as *Gilberti* did not involve a constitutional analysis under the Commerce Clause, but rather merely considered whether the LTEA authorized a municipality to tax receipts generated outside its boundaries. Indeed, whether a tax that may be authorized under the LTEA nevertheless violates the Commerce Clause is a completely separate issue that, contrary to the apparent belief of the Commonwealth Court, cannot be resolved without reference to the governing constitutional principles.

Moreover, on constitutional grounds, we simply cannot accept the Commonwealth Court's ultimate conclusion that Northwood's maintenance of its primary business office in the Township permits the Township to tax 100% of Northwood's receipts generated in connection with interstate activity. The Commonwealth Court characterized the tax as one on the privilege of maintaining an office in the Township, and thus, concluded that it taxes in-state activity only. However, when considering the constitutionality of a gross receipts tax, it is the activities that *generate* those gross receipts that are determinative in an

apportionment analysis as it is only the receipts generated from the in-state component of the underlying activity that the Township may properly tax under constitutional apportionment principles. *See Jefferson Lines*, 514 U.S. at 190, 115 S.Ct. 1331 (gross receipts tax is "simply a variety of tax on income, which [is] required to be apportioned *to reflect the location of the various interstate activities by which it was earned*") (emphasis added); *Philadelphia Eagles*, 823 A.2d at 133 (plurality) (focusing on the "underlying activity that generated the . . . receipts" in ascertaining the states to which receipts should be allocated for purposes of BPT); *General Motors Corp. v. City & County of Denver*, 990 P.2d 59, 71 (Colo. 1999) ("In the context of . . . taxes on gross receipts, apportionment must take into account the location *where revenue is generated.*") (emphasis added).

The Township essentially takes the position that it is under no obligation to allocate Northwood's receipts among the other states in which Northwood conducts business, because the Exclusionary Provision ensures that there is no risk of multiple taxation. In forwarding this argument, the Township essentially ignores Supreme Court precedent that the "central purpose behind the apportionment requirement is to ensure that each state taxes only its fair share of an interstate transaction," *Goldberg*, 488 U.S. at 260, 109 S.Ct. 582 and instead cites the opinion of the Commonwealth Court below for the proposition that "[t]he primary test of apportionment is avoidance of multiple taxation." Township Brf. at 20 (citing 802 A.2d at 1275). However, we cannot be similarly dismissive of the controlling Supreme Court jurisprudence. While the Supreme Court has characterized the principle of fair apportionment as "the lineal descendent of

Western Live Stock's prohibition of multiple taxation," *Oklahoma Tax Comm'n,* 514 U.S. at 184, 115 S.Ct. 1331 (referring to *Western Live Stock v. Bureau of Revenue,* 303 U.S. 250, 58 S.Ct. 546, 82 L.Ed. 823 (1938)), the external consistency requirement ultimately mandates that a tax not "reach[] beyond that portion of value that is fairly attributable to economic activity within the taxing State," irrespective of whether there is a genuine risk of multiple taxation. *Id.* at 185, 115 S.Ct. 1331; *see Southern Pac. Transp. Co. v. Arizona, Dep't of Revenue,* 202 Ariz. 326, 44 P.3d 1006, 1012 (Ariz. Ct. App. 2002) (rejecting "proposition that a state's tax on interstate commerce must be deemed externally consistent unless the aggrieved taxpayer establishes that a multiple tax burden actually exists"); Hellerstein, 87 Mich. L. Rev. at 186 ("Wholly apart from its role in preventing multiple taxation, the fair apportionment criterion serves to limit the territorial reach of state power by requiring that the state's tax base corresponds to the taxpayer's in-state presence."). As such, even assuming *arguendo* that the Township is correct that the Exclusionary Provision eliminates the risk of multiple taxation,[19] we disagree that the Township's apportionment obligations are therefore satisfied. Rather, we conclude that the appropriate inquiry remains whether the Township has taxed only that "portion of the revenues from the interstate activity which reasonably reflects the instate component of the activity being taxed." *Goldberg,* 488 U.S. at 262, 109 S.Ct. 582. Here, as explained above, the Township is plainly taxing more than that "portion of the

[19] Of course, Northwood does not agree with this premise as it contends that in spite of the Exclusionary Provision, its receipts have been taxed twice because the Township has refused to provide it with the exclusions to which it is entitled. *See supra* nn. 12, 18.

revenues from [Northwood's] interstate activities which reflect the instate component of the activity being taxed," *id.*, as it is taxing *all* of the revenues from Northwood's interstate activities.[20] Accordingly, we hold that the tax does not satisfy the external consistency prong of *Complete Auto* and is therefore unconstitutional.

In sum, we hold that the Ordinance and Regulations are within the Township's authority under the LTEA, but nevertheless find them unconstitutional under the Commerce Clause of the United States Constitution. Accordingly, we reverse the decision of the Commonwealth Court below insofar as it concluded that the Commerce Clause does not require apportionment of Northwood's receipts, but affirm it in all other respects.

Former Justice LAMB did not participate in the decision of this case.

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[20] Although application of the Exclusionary Provision should, in theory, reduce the extent to which interstate receipts are taxed, it has obviously not done so here. Northwood asserts that this is due, at least in part, to the Township's failure to apply the provision properly. *See supra* nn.12, 18. However, the record in this case is insufficient to determine whether Northwood is correct in this regard and in any event, whether the Township should have given Northwood certain exclusions is immaterial to our resolution of whether the tax that the Township has actually imposed violates the Commerce Clause.

Moreover, even assuming that the Township should have given Northwood some exclusions for receipts on which taxes were paid to other states under the Exclusionary Provision, we feel compelled to note that we have no confidence that such exclusions would fully resolve any external consistency problem, because their availability is entirely dependent on the whims of other states, which may or may not impose a BPT or similar tax on receipts that are properly allocated to them.

JUDGMENT ENTERED:
September 2, 2004

s/ Shirley Bailey
Shirley Bailey,
Chief Clerk

APPENDIX B

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

NORTHWOOD CONSTRUCTION COMPANY, INC.,
Appellant,

v.

TOWNSHIP OF UPPER MORELAND.

No. 2853 C.D. 2001

Argued: June 13, 2002.

BEFORE:
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE RENÉE L. COHN, Judge
HONORABLE CHARLES P. MIRARCHI, JR., Senior Judge.

OPINION BY Judge FRIEDMAN.Filed: July 19, 2002.

Northwood Construction Company, Inc. (Northwood) appeals from the November 15, 2001, order of the Court of Common Pleas of Montgomery County (trial court), which dismissed Northwood's motion for summary judgment and granted the cross-motion of Upper Moreland Township (Township), entering judgment against Northwood in the amount of $257,579.52 plus accrued penalties and interest. We affirm.

Northwood is a corporation with its principal place of business in the Township. Northwood performs construction management, general contracting and related business activities outside the Township at locations in Pennsylvania, Delaware, New Jersey and Maryland. (Second Stipulation of Facts, Nos. 1, 3, 4, 7.)

The Township has enacted a Business Privilege Tax (Tax) that applies to all businesses located within or doing

business within the Township. Northwood engages in business that is subject to the Tax and has filed returns with the Township for the years 1995, 1996, 1997 and 1998. (Stipulation of Facts, Nos. 5-7.)

In its 1997 and 1998 filings, Northwood made no Tax payment, claiming that it was due a refund for overpayments in previous years. The Township denied Northwood's claim that it was due any refund and requested the payment of $257,579.52 plus interest and penalties for the years 1995 through 1998. In denying Northwood's claim, the Township refused to exclude Northwood's income that was subject to taxation in New Jersey, Delaware and Maryland from Northwood's gross receipts. The Township *did* exclude receipts for business activity outside the Township but within Pennsylvania where Northwood paid a privilege or similar tax to another entity. (Stipulation of Facts, Nos. 14- 20; Second Stipulation of Facts, No. 20.)

Northwood filed a civil action with the trial court, seeking a refund of the Tax it paid on receipts from New Jersey, Delaware and Maryland and on receipts from intrastate business activity outside the Township where Northwood did *not* pay a privilege or similar tax to another entity. (R.R. at 16a-22a.) The Township filed a counterclaim, seeking the Tax due plus penalties and interest. (R.R. at 40a.) The parties then filed a Stipulation of Facts, a Second Stipulation of Facts and motions for summary judgment.

In ruling on the matter, the trial court addressed two legal issues: (1) whether applying the Tax to the intrastate gross receipts of Northwood generated outside the Township violates the Township Code; and (2) whether applying the Tax to the interstate gross receipts of Northwood

generated in New Jersey, Delaware and Maryland violates the Commerce Clause of the U.S. Constitution. The trial court determined that it was proper to apply the Tax in both cases. Northwood now appeals to this court.[1]

I. Intrastate/Outside Township

As it did before the trial court, Northwood argues here that applying the Tax to intrastate gross receipts generated outside the Township violates the Township Code. We disagree.

A. Township Code

Title 2, Chapter 7, Article 1, Section 1.04 of the Township Code (Code), states that every person "engaging in a business . . . in the Township shall pay an annual Business Privilege Tax . . . on his [or her] gross receipts. . . . "[2] (R.R. at 47a.) Section 1.02(f) of the Code defines "gross receipts" as "property of any kind or nature received or allocable or attributable to any business . . . without deduction therefrom. . . ." (R.R. at 44a.) The term "gross receipts" excludes "[r]eceipts upon which a business privilege tax or similar

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[1] This court's scope of review of a trial court's decision to grant or deny a motion for summary judgment is limited to determining whether the trial court committed an error of law or abused its discretion. *City of York v. Schaefer Temporary Services, Inc.*, 667 A.2d 495 (Pa. Cmwlth. 1995)

[2] The Township enacted this provision pursuant to section 2 of The Local Tax Enabling Act (LTEA), Act of December 31, 1965, P.L. 1257, *as amended*, 53 P.S. § 6902, which states that townships of the first class, like the Township here, may levy, assess and collect such taxes as they shall determine on privileges within the limits of such political subdivision.

tax has been imposed by another political subdivision by reason of the performance of the service or conducting the business in that political subdivision." (Section 1.02(f)(4) of the Code, R.R. at 44a.)

Northwood argues that sections 1.02(f) and 1.04 of the Code, when read together, mean that the Township may only tax gross receipts allocable or attributable to business conducted in the Township. However, the plain language of these provisions does not support such a construction. Section 1.04 imposes the Tax on an entity "engaging in a business in the Township," and Northwood engages in a business in the Township. Under section 1.02(f), the Tax is imposed on gross receipts "allocable or attributable to" Northwood's business. The provision does *not* limit the Tax to business conducted within the Township.[3]

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[3] In *Gilberti v. City of Pittsburgh*, 511 Pa. 100, 108-09, 511 A.2d 1321, 1326 (1986) (emphasis added), our supreme court stated:

> Maintaining a business office in the City is an exercise of a privilege "within the limits" of the taxing district, and, thus, a tax can thereupon be levied. . . . [T]he tax . . . is levied only upon a privilege exercised within the City, to wit maintenance of a business office, and the fact that the amount of tax is dependent upon the taxpayer's gross receipts, *including receipts from services performed outside the City,* does not undermine the legitimacy of the tax. . . .
>
> [H]aving a place of business within the City enables the taxpayer to have a base of operations from which to manage, direct, and control business activities occurring both inside and outside the City limits. Further, the in-City office provides a place from which to solicit business, accept communications, conduct meetings, store supplies, and perform office work. All of these activities are, in the usual course, necessary to any business operation. *This is so irrespective of whether the business performs services at job sites outside of the City.*

(Continued on following page)

B. Bona Fide Offices

Northwood also argues that, under *Gilberti v. City of Pittsburgh,* 511 Pa. 100, 511 A.2d 1321 (1986), Northwood should be allowed to exclude receipts attributable to Northwood's *bona fide* offices outside the Township. Northwood contends that its on-site trailers at various construction sites outside the Township constitute *bona fide* offices under the regulations promulgated pursuant to the Pittsburgh Business Privilege Tax Ordinance. However, the Pittsburgh ordinance and the Pittsburgh regulations, which contain provisions dealing with *bona fide* offices, are not relevant here. The Township's Code does *not* contain any special provisions relating to *bona fide* offices.

The Township's Code *does* contain section 102(f)(4), a provision excluding from "gross receipts" any receipts upon which a business privilege tax or similar tax has been imposed by another political subdivision by reason of the performance of the service or conducting the business in that political subdivision. (R.R. at 44a.) Thus, *if* Northwood had a *bona fide* office in another political subdivision and, as a result, paid a business privilege or similar tax to that political subdivision, the Township would exclude related receipts from "gross receipts." In fact, here, the Township *did* exclude intrastate receipts for business

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In recognition of this, we believe the legislature has provided for the City to collect a tax upon the privilege of having a place of business in the City, and *the measure of that tax is not to be so limited as to ignore the contribution to out-of-City activities provided by maintaining a base of operations within the City.*

activity outside the Township where Northwood paid a business privilege or similar tax to another entity.

Moreover, in *G.A. & F.C. Wagman, Inc. v. Manchester Township,* 112 Pa. Cmwlth. 357, 535 A.2d 702, 704 (1988), where the local ordinance exempted from the business privilege tax "an office . . . regularly maintained by the taxpayer, outside the limits of the [township]" this court held that the provision applied only to *permanent* offices outside the township. As stated, the Township's Code does not contain a similar provision; however, even if it did, Northwood's *temporary* on-site trailers would not constitute *permanent* offices outside the Township. Therefore, Northwood would *not* be entitled to the exemption.

Finally, Northwood argues that, according to *Township of Lower Merion v. QED, Inc.,* 738 A.2d 1066, 1071 n. 6 (Pa. Cmwlth. 1999), *appeal denied,* 565 Pa. 680, 775 A.2d 811 (2001), section 8 of The Local Tax Enabling Act[4] (LTEA) allows for a business privilege tax exemption where a company has more than one base of operations. That is not true. The footnote in *Township of Lower Merion* states, "Section 8 of the LTEA . . . has been interpreted by the courts to provide that the taxpayer must receive credit for gross receipts taxes *paid* to another municipality where the base of operations exists and from the receipts generated by that office." *Id.* (emphasis added). As indicated above, in this case, the Township *did* exempt from taxation the gross receipts of Northwood that were taxed in another political subdivision.

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[4] Act of December 31, 1965, P.L. 1257, *as amended,* 53 P.S. § 6908.

II. Interstate Commerce

Northwood next argues that applying the Tax to gross receipts generated in New Jersey, Delaware and Maryland violates the Commerce Clause of the U.S. Constitution. We disagree.

The Commerce Clause provides that Congress shall have the power to "regulate Commerce . . . among the several States." U.S. Const., Art. I, § 8, cl. 3. Courts have held that this express grant of power contains a negative command, known as the dormant Commerce Clause, which prohibits certain state taxation even when Congress has failed to legislate on the subject. *Philadelphia Eagles Football Club, Inc. v. City of Philadelphia*, 758 A.2d 236 (Pa. Cmwlth. 2000), *appeal granted in part*, 564 Pa. 472, 769 A.2d 443 (2001).

Early U.S. Supreme Court cases held that interstate commerce was wholly immune from state taxation. *Id.* However, in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S. Ct. 1076, 51 L.Ed. 2d 326 (1977), the Court abandoned this approach and articulated a four-part test for determining the validity of state taxation under the Commerce Clause:

1. The tax must be applied to an activity that has a substantial nexus with the state;
2. The tax must be fairly apportioned to the taxpayer's activity;
3. The tax must not discriminate against interstate commerce; and
4. The tax must be fairly related to benefits provided by the state.

Philadelphia Eagles, 758 A.2d at 250 (citing *Complete Auto Transit*).

Northwood concedes that there is a substantial nexus here between Northwood's business activities and the Township's Tax. (Northwood's brief at 37.) However, Northwood questions the validity of the Township's Tax based on the other three elements of the test.

A. Apportionment

The test of apportionment is avoidance of multiple taxation or the risk of multiple taxation. *Philadelphia Eagles*. A properly apportioned tax must be both internally and externally consistent. *Id.*

> Internal consistency is preserved when the imposition of a tax identical to the one in question by every other state would add no burden to interstate commerce that intrastate commerce would not also bear. Internal consistency does not preclude multiple states from taxing the same transaction so long as the portion of the income taxed by each state is not taxed by another state. "This test asks nothing about the degree of economic reality reflected by the tax, but simply looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate."
>
> External consistency, on the other hand, looks to the economic justification for the state's claim upon the value taxed, to discover whether the tax reaches beyond the portion of value that is fairly attributable to economic activity within the taxing

> state. The question is whether the state has taxed only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed.

Id. at 250-51 (citations and footnote omitted).

First, the Tax here is internally consistent. If imposed in every other state, there would be an allocation of gross receipts to avoid multiple taxation. Section 1.02(f)(9) of the Code states,

> The Collector shall promulgate rules and regulations setting forth methods of allocation of gross receipts for such cases where the gross receipts of a business in its entirety are not subject to tax imposed by this Ordinance by reason of the provisions of the Commerce Clause of the United States Constitution or under the Constitution of the Commonwealth of Pennsylvania.

(R.R. at 45a.) Pursuant to section 1.02(f)(9), the Township has promulgated a regulation with an allocation formula that applies to persons "engaged in interstate commerce, having places of business in more than one State." (Northwood's brief, Exh. C.) Thus, where a company has a place of business in another state and, as a result, is subject to a business privilege tax in the other state, there would be an allocation of gross receipts between the states, thereby avoiding a multiple business privilege tax.[5]

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[5] Northwood argues that the trial court erred in failing to apply this provision to Northwood. However, the trial court noted that Northwood failed to provide credible evidence that it had a place of business in another state. (Trial court op. at 10 n. 2.)

Northwood also argues that the Tax does not avoid multiple taxation because Northwood's gross receipts from out-of-state activities are

(Continued on following page)

Second, the tax here is externally consistent. The Township taxes only that portion of a company's revenues from interstate activity that reasonably reflects the company's maintenance of a permanent business office in the Township. In other words, the Township can justify a tax on the privilege of maintaining an office within the Township where, from that office, a company is able to manage, direct and control *all* of its interstate business activities. *See Gilberti.*

B. Discrimination

A state may not impose a tax that discriminates against interstate commerce by providing a direct commercial advantage to local business. *Philadelphia Eagles.* States are barred from discriminating against foreign enterprises competing with local businesses and from discriminating against commercial activity occurring outside the taxing state. *Id.* A tax that, by its terms or operation, imposes greater burdens on out-of-state goods or activities than on competing in-state goods or activities is unlawfully discriminatory under the Commerce Clause and will be struck down. *Id.*

The Tax here does *not* impose a greater burden on out-of-state activities than on competing in-state activities. The Tax imposes the same millage rate on gross receipts from both in-state and out-of-state activities. Moreover, as indicated above, the Tax does not allow for multiple

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already taxed by other states. However, Northwood does not claim that the other tax is for the privilege of maintaining a business office in the other state.

taxation where a company is also taxed for the privilege of maintaining a business office in another state.[6]

C. Fair Relation

The Commerce Clause demands a fair relation between a tax and the benefits conferred upon the taxpayer by the state. *Id.*

> The test is whether the tax is reasonably related to the extent of taxpayer contact with the state, since it is the activities or presence of the taxpayer in the state that may properly be made to bear a just share of state tax burden. This prong is closely related to the nexus requirement. Generally, if the business has the requisite nexus with the state, then the tax meets the fourth factor simply because the business has enjoyed the opportunity and protections which the state has afforded it.
>
> The fair relation prong does not require a detailed accounting of the services provided to the taxpayer on account of the activity being taxed, nor is a state limited to offsetting the public costs created by the taxed activity. Interstate commerce may thus be made to pay its fair share of state expenses and "contribute to the cost of providing all governmental services, including those services from which it arguably receives no direct

[6] Northwood argues that the Tax discriminates against interstate commerce because, under section 1.02(f)(4) of the Code, there is no tax on intrastate gross receipts where a company has paid a business privilege tax in another political subdivision. However, under section 1.02(f)(9) of the Code, if Northwood had an out-of-state business office and, as a result, was subject to a business privilege tax in another state, there would be an allocation of gross receipts.

> 'benefit.'" The "just share of state tax burden" includes sharing in the cost of providing "police and fire protection, the benefit of a trained work force, and 'the advantages of a civilized society.'"

Id. at 254 (citations omitted).

Along with the privilege of maintaining its office in the Township, Northwood enjoys certain governmental services. This is enough to establish a fair relation between the Tax on gross receipts from out-of-state activities and benefits conferred by the Township.

Accordingly, we affirm.

s/Rochelle S. Friedman
Rochelle S. Friedman, Judge

ORDER

AND NOW, this 19th day of July, 2002, the order of the Court of Common Pleas of Montgomery County, dated November 15, 2001, is hereby affirmed.

APPENDIX C

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA CIVIL DIVISION

NORTHWOOD CONSTRUCTION COMPANY, INC.,	:	
v.	:	No. 99-13429
TOWNSHIP OF UPPER MORELAND	:	

OPINION

Moore, J. (February 8, 2002)

Appellant, Northwood Construction Company, Inc. ("Northwood") is a Construction Manager/General Contractor. Northwood's principal place of business is located at 2563 Wyandotte Road, Willow Grove, Upper Moreland Township, Montgomery County Pennsylvania. Appellee, Upper Moreland Township ("Township"), is a township of the First Class, duly organized under the laws of the Commonwealth of Pennsylvania.

Northwood contests the application of the Township's Business Privilege Tax towards its taxable gross receipts for the years 1995, 1996, 1997 and 1998.

In 1977, the Township enacted a Business Privilege Tax Ordinance, which has been subsequently amended, under the authority of the "Local Tax Enabling Act". Act of December 31, 1965, P.L. 1257, 53 P.S. § 6901 et seq., as amended. This Ordinance required every individual, partnership, unincorporated corporation and corporation engaged in business within the Township to file a business tax return on or before May 1 of each year reporting its gross receipts from the preceding calendar year and

paying the tax as measured by the taxable gross receipts. Taxable gross receipts are gross receipts less statutory exclusions and other exclusions. The Business Privilege Tax is 3.5 mills on the taxable gross receipts. (Township's Answer, New Matter and Counterclaim, Exhibit B).

Northwood claims that it overpaid the BPT and is due a refund for the years 1995-1997. Northwood acknowledges that it owes these taxes for 1998 but withheld the amount due based on the refund it had previously estimated. Appellant's argument is premised upon its interpretation of what exactly constitutes a bona fide office. Northwood maintains trailers at various construction sites located outside of the Township. It claims that these trailers constitute bona fide offices and accordingly the revenue generated from these sites is not allocable to the Township and therefore are not subject to its BPT.

Appellant also claims that the Township should have excluded gross receipts generated from work performed in New Jersey, Delaware and Maryland for the taxable years 1995 through and including 1998. Northwood argues that subjecting revenues generated from work performed in these states to the Township's BPT violates the Commerce Clause of the United States Constitution.

The Township denied Northwood's claims for a refund and subsequently determined that Northwood had actually under paid its BPT for those years. The Township thereafter filed a counterclaim against Northwood to recover the BPT that should have been paid for those years.

Both parties filed Motions for Summary Judgment certifying to the Court that there are no factual issues in dispute and the matter to be decided is a pure matter of

law. (NT p. 2, September 28, 2001). Northwood motioned for Summary Judgment in its claim for the refund against the Township. The Township filed a cross-motion for Summary Judgment on its counterclaim against Northwood for taxes unpaid for the years 1995 through and including 1998.

Northwood engages in business which is subject to the Upper Moreland BPT. *(See* First Stipulation of Facts, ¶ 6). Northwood performs construction management, general contracting and related business activities outside of the Township. *(See* Second Stipulation of Facts, ¶ 7) As a Construction Manager/General Contractor, Northwood maintains trailers at various construction sites during construction activities. *(See* Second Stipulation of Facts, ¶ 8). Northwood contends that these trailers located at the various construction sites outside of the Township constitute bona fide offices. For that reason, Appellant argues that the gross receipts attributable to these "trailers" located outside of the township are not subject to the Township's BPT as these receipts are not attributable to any business conducted within the township within the meaning of the Township's ordinance.

Appellant argues that these trailers constitute bona fide offices as they are provided with telephone, utility, facsimile, and copier service and are used to meet with customers, subcontractors, vendors and Northwood's employees. *(See* Second Stipulation of Facts, ¶¶ 9-11, 14). They are also are [sic] subdivided into three rooms and contain job records, drawings, specifications, schedules, and employee records relating to that particular job. *(See* Second Stipulation of Facts ¶¶ 12-13). While some of Appellant's trailers contain these amenities, all do not. Appellant's argument is premised upon the existence or

non-existence of a trailer at a construction site without regard to the size of the job or the size of the trailer. So long as a trailer is present, Appellant argues that it is exempt from the Township's BPT.

Northwood further claims that gross receipts received from jobs located outside of the Commonwealth are subject to tax in other jurisdictions and are therefore not subject to the Township's BPT pursuant to the Commerce Clause of the U.S. Constitution.

This Court heard oral argument on Northwood's Summary Judgment claim and the Township's Cross-Motion for Summary Judgment on its Counterclaim. By Order dated November 15, 2001, this Court denied Northwood's claim for Summary Judgment and granted the Township's Cross-Motion for Summary Judgment. Northwood appeals this Court's Order. In accordance with Pennsylvania Rule of Appellate Procedure, Rule 1925(b), Northwood set forth two issues on appeal: (1) whether the Trial Court erred in holding that all of Appellant's gross receipts were subject to Upper Moreland Township's Business Privilege Tax; and (2) whether the Trial Court erred in holding that subjecting Appellant's interstate gross receipts to the Township's Business Privilege Tax does not violate the Commerce Clause of the Constitution.

This Court rejects Appellant's legal argument and finds that Northwood was not entitled to Summary Judgment as (1) the trailers do not constitute bona fide offices and therefore the gross receipts generated from construction sites outside of the township are subject to the Township's BPT and are attributable to Northwood's sole place of business located within the Township; and (2) gross receipts generated from construction sites outside of the

Commonwealth of Pennsylvania are subject to the Township's BPT within the purview of the Township's Ordinance and the Commerce Clause of the United States Constitution. Furthermore, Northwood's concise statement of matters complained of on appeal does not contest the amount of the Township's cross claim in the event that its claim for an exemption from the Township's BPT is rejected. Accordingly, this Court properly granted the Township's cross claim for Summary Judgment in the amount of $257,579.52 plus accrued penalty and interest.

This opinion follows:

II. [sic] DISCUSSION

A. Construction Site Trailer's [sic] Do Not Constitute Bona Fide Offices; Accordingly, All Gross Receipts Generated From These Sites Are Attributable To Appellant's Upper Moreland Office And Are Subject To Its Business Privilege Tax.

This Court rejects Northwood's argument that the trailers it provides at various construction sites outside of the Township qualify as bona fide offices and as such the gross receipts generated from these sites are not subject to the Township's BPT. This Court finds that any and all gross receipts generated from construction sites located within the Commonwealth of Pennsylvania but outside of the Township are attributable to Northwood's principal place of business and therefore are subject to the Township's BPT.

This Court followed the rationale set forth in *Gilberti and Wagman, infra* in deciding this matter. The analysis of these cases was based upon the fact that the taxpayer in each case had its only business office in their respective

township. While, Northwood argues its situation is distinguishable from *Gilberti and Wagman,* claiming it does not have a sole business office, this Court disagrees.

The case *of Gilberti v. City of Pittsburgh,* 511 A.2d 1321 (Pa. 1986), determined that the City of Pittsburgh could impose its BPT upon the entire gross receipts of a taxpayer, including the portion of gross receipts derived from services rendered outside of the City, when the taxpayer's sole business office is located within the City. The *Gilberti* Court reasoned that the maintenance of a business office within the City is an exercise of a privilege within the limits of the taxing district and, thus, a tax can thereupon be levied. *Gilberti,* at 1325-26.[1]

More on point with the instant matter is the case of *G.A. & F. C. Wagman, Inc. v. Manchester Township,* 535 A.2d 702 (Pa. Cmwlth. Ct. 1988). Wagman, the appellant, was a construction company who operated in both interstate and intrastate locations. Wagman argued that revenues generated outside of Manchester Township, which is the company's primary business location, but within the Commonwealth are not subject to the Township's BPT. Wagman argued unsuccessfully that the Manchester Township office did not manage and control all aspects of the companies business and that temporary on-site offices often supervise the individual projects. The Commonwealth Court rejected these arguments and

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[1] This is wholly within the purview of the Local Tax Enabling Act which states that "[C]ertain political subdivisions are empowered to: . . . levy, assess and collect or provide for the levying, assessment and collection of such taxes as they shall determine on persons, transactions, occupations, privileges, subjects and personal property within the limits of such political subdivisions . . . ". 53 P.S. § 6902.

stated that these revenues are subject to the BPT. The Court stated that these arguments do not negate the fact that the root of all of the companies business is at its sole business location in Manchester Township. This Court further noted that Wagman is not exercising the taxed privilege of maintaining a business office in any other jurisdiction; therefore there is nothing improper in taxing the receipts from services performed both in and outside the township. It is this statement upon which Northwood reasons that its gross revenues from job sites with trailers are not subject to the Township's BPT.

Appellant claims it is exercising the privilege of maintaining a business office, in the form of a trailer, in other jurisdictions and therefore subjecting those receipts to the Township's BPT is improper. Such an argument is not supported by any legal authority.

Appellant's position is that the application of the BPT is solely dependant upon the existence or non-existence of a trailer at a construction site, regardless of the nature and size of the job or trailer. (NT p. 15, 23-27, September 28, 2001). It claims that they are no longer exercising the privilege of doing business in Upper Moreland, if it maintains trailers elsewhere. This Court rejects this analysis presented by Northwood. The taxes imposed on Northwood are premised upon the privilege of operating its business within the Township.

Despite the fact that Appellant's trailers contain office space and amenities, they do not constitute "bona fide" offices. These trailers are temporary in nature as they occupy the respective construction site from the time a job is awarded to Northwood to the time that the job is complete. Revenues generated from these construction sites

outside of the Township are received by the main office in Upper-Moreland Township and are not apportioned according to a particular trailer. Furthermore, all salaries are paid from Northwood's main office.

Moreover, these trailers would not be able to function without the existence of the office within the Township, Northwood's "base of operations". Northwood's sole principal place of business is located within the Township. It is from this location that jobs are bid upon and contracts are established. The address listed for tax purposes is Northwood's principal office in Upper Moreland Township, which is its only main business office. (NT p. 16, September 28, 2001).

Accordingly, this Court rejects Appellants argument and finds that Northwood's gross receipts generated at construction sites located outside of Upper Moreland Township are subject to the BPT.

B. <u>Upper Moreland' Business Privilege Tax Does Not Violate the Commerce Clause of the United States Constitution.</u>

Northwood is a Construction Corporation with its principal place of business located in the Commonwealth of Pennsylvania. It performs construction services within the Commonwealth as well as in the States of New Jersey, Delaware and Maryland. The BPT tax, which Northwood contests, is a tax on the gross receipts generated by Northwood in its course of business based on the privilege of Northwood maintaining its principal place of business in Upper Moreland Township. The Township's BPT is not a tax on the privilege of doing business in the Commonwealth of Pennsylvania.

In rejecting Appellant's argument that the Township's BPT violates the United States Commerce Clause, this Court followed the rationale of the Commonwealth Court's ruling in *Spielvogel, Inc. v. Township of Cheltenham,* 601 A.2d 1310 (Pa. Cmwlth. Ct. 1992) and further held that the ordinance at issue satisfies the test *of Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 279, 97 S. Ct. 1076, 1079, 51 L. Ed. 326, ___ (1977).

In *Spielvogel,* the Commonwealth Court held that a Municipality could impose its BPT upon interstate gross receipts, without violating the Commerce Clause of the United States Constitution. The Commonwealth Court relied on the cases of *Gilberti, Wagman,* and *Complete Auto Transit* in reaching this conclusion.

The Township's Business Privilege Tax ordinance satisfies the four prong test set forth in *Complete Auto Transit, Inc. v. Brady,* which establishes whether a local tax ordinance complies with the Commerce Clause. 430 U.S. 274, 279, 97 S. Ct. 1076, 1079, 51 L. Ed. 326, ___ (1977). The four elements include the following: (1) whether the activity being taxed has a substantial nexus with the taxing state; (2) whether the tax is fairly apportioned; (3) whether the tax does not discriminate against interstate commerce; and (4) whether the tax is fairly related to the services provided by the taxing body. *Id.*

Upper Moreland imposes its BPT on all businesses within Upper Moreland, as defined by the ordinance. Northwood's principal place of business is located within the Township. Accordingly, Northwood's activity of operating its main office has a sufficient nexus with the taxing body, the Township. The BPT is fairly apportioned as it is equally imposed on all service-oriented businesses for the

privilege of maintaining a place of business within the Township. The tax does not single out a particular industry on which to impose its BPT. The Township's BPT does not discriminate against interstate commerce. It does not favor local businesses by imposing a heavier tax burden on non-local or interstate business, thereby discouraging interstate business. It does not provide local businesses with an unfair advantage. Further, the tax ordinance at issue is not a direct tax upon Northwood's interstate business activity but rather a tax upon the privilege of maintaining a business office in the Township. *See, Wagman* at 706. Finally, the revenues generated from the Township's BPT are used to support the governmental obligations of the Township, from which every business situated within the Township benefits.

Furthermore, Northwood has failed to establish any evidence indicating that its interstate services are subject to an additional business privilege tax in another state.[2]

Accordingly, Upper Moreland's BPT does not violate the Commerce Clause as it satisfies the *Complete Auto Transit* test.

III. CONCLUSION:

This Court's [sic] finds Appellant's argument that the existence of a trailer at a construction site would relieve Appellant from its responsibility to pay the proper BPT is without any legal authority and is totally lacking in merit.

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[2] Moreover, Northwood has failed to provide credible evidence proving the existence of a business office in another State which would trigger the apportionment of interstate receipts under Article I, Ch.7 of Title 2 of the Township's Code.

Accordingly, this Court rejected Appellant's reasoning and granted the Township's cross claim. Therefore, this Court's order of November 15, 2001, which denied Northwood's Motion for Summary Judgment and granted The Township of Upper Moreland's Motion for Summary Judgment was proper and should be affirmed.

BY THE COURT:

s/ Bernard A. Moore

BERNARD A. MOORE, J.

Date: February 8, 2002

CC: Howard M. Soloman, Esquire
Stewart M. Weintraub, Esquire
George B. Ditter, Esquire
Kathleen M. Thomas, Esquire

APPENDIX D

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA CIVIL DIVISION

NORTHWOOD CONSTRUCTION COMPANY, INC.,	:	
	:	**No. 99-13429**
v.	:	
TOWNSHIP OF UPPER MORELAND	:	

ORDER

AND NOW, this 15th day of November 2001, in consideration of Northwood Construction Company's Motion for Summary Judgment, the Response filed by the Township of Upper Moreland, the Cross Motion for Summary Judgment and the briefs and arguments in support of said motions, it is hereby ORDERED and DECREED, that Northwood's Motion for Summary Judgment is hereby dismissed and, judgment is entered in favor of Upper Moreland Township on the Cross Motion against Northwood Construction Company in the amount of $257,579.52 plus accrued penalty and interest.

BY THE COURT
/s Bernard A. Moore
J.

Copies mailed 11/15/01 to:
Howard Soloman, Esq.
Kathleen Thomas, Esq.
J. McAllister, Court Admin.
/s [Illegible]
Secretary

APPENDIX E

UPPER MORELAND TOWNSHIP CODE

Title 2 – ADMINISTRATION Chapter 7 – TAXATION

ARTICLE 1 – BUSINESS PRIVILEGE

HISTORY: With adoption of Code 12/7/77; Ord. #897, 12/29/78; Ord. #940, 12/30/80; Ord. #1029, 7/18/83; Ord. #1118, 12/30/86; Ord. #1136, 7/20/87; Ord. #1141, 10/05/87; Ord. #1164, 9/6/88; Ord. #1165, 9/6/88; Ord. #1190, 7/10/89; Ord. #1381, 11/9/98)

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SECTION 1.01 SHORT TITLE

This Ordinance shall be known and may be cited as the "Business Privilege Tax Ordinance".

SECTION 1.02 DEFINITIONS

The following words and phrases, when used in this Ordinance, shall have the meanings ascribed to them in this Section unless the context clearly indicates a different meaning:

(a) "Person" shall mean an individual, partnership, corporation, unincorporated association or any legal entity.

(b) "Business, trade, occupation, profession, and vocation" shall include, but not be limited to, all businesses, trades, occupations, professions, and vocations in which there is offered any service or services to the general public or a limited number thereof including those enterprises engaged in by hotel operators, motel operators, parking lot and garage operators, warehousemen, lessors of real and tangible personal property, physicians and surgeons, osteopaths, podiatrists, chiropractors, veterinarians, optometrists, pharmacists, lawyers, dentists, engineers, architects, chemists, certified public accountants, public accountants, funeral directors, promoters, factors, commission merchants, agents, brokers, manufacturer's representatives, advertising and public relations agencies, real estate brokers, insurance brokers and agents, cable television operators, operators of places of amusement providing either passive or active recreation,

vending machine operators, barber shop operators and beauty shop operators, cleaning, pressing, and dyeing establishment operators, laundry operators, shoe repair shop operators, tailors, upholsterers, electrical, plastering, bricklaying, carpentry, heat, ventilating, plumbing, and painting contractors engaged in the class of heavy building or other construction of any kind or in the alteration, maintenance, or repair thereof, repairers or consultants of electrical, electronic, electronic, and automotive machinery or equipment or other machinery and equipment and other wares and merchandise.

(c) The terms as defined in subsections (a) and (b) of this Section shall not include the following:

(i) The Government of the United States or of the Commonwealth of Pennsylvania, or any employee or agency thereof.

(ii) Any organization or nonprofit corporation which is or has been determined to be an organization described in Section 501(c)(3) of the Internal Revenue Code of 1986, as amended (the "Code"), and is exempt from Federal income taxes under Section 501(a) of the Code; PROVIDED, however that such organization or nonprofit corporation shall be required to register under Section 1.05 of this Article and the tax imposed under this Article shall be applicable to any "unrelated business income" as defined in Section 512 of the Code of such organization or nonprofit corporation.

(d) "Service" shall mean any act or instance of helping or benefiting another for a consideration.

(e) "Tax Year" shall mean the twelve (12) month period beginning the first day of January and ending the last day of December.

(f) "Gross Receipts" means cash, credits, property of any kind or nature, received or allocable or attributable to any business, or services rendered, or commercial or business transactions without deduction therefrom on account of the cost of property sold, materials used, labor, service or other costs, interest, or discount paid, or any other expense. "Gross Receipts" excludes the following:

(1) In the case of a financial business, the cost of securities and other property sold, exchanged, paid at maturity, or redeemed and monies or credits received in repayment of advances, credits, and loans, but not to exceed the principal amount of such advances, credits, loans and deposits;

(2) In the case of a broker of financial papers, commissions paid by him to another broker on account of a purchase or sales contract initiated, executed, or cleared in conjunction with such other broker;

(3) In the case of a real estate developer or general contractor, the amounts paid by such developer or general contractor to contractors or sub-contractors, registered to do business in the Township and to the extent that such contractors or subcontractors have made timely payment of the taxes imposed by this Ordinance;

(4) Receipts upon which a business privilege tax or similar tax has been imposed by another political subdivision by reason of the performance of the service or conducting the business in that political subdivision; provided, that proof of payment of such tax must be

provided to the Collector at the time of claiming such exclusion;

(5) Refunds, credits, or allowances given by a person to a customer on account of defects in services rendered or in goods, wares, and merchandise sold or returned may be excluded from the amount of the "gross receipts" of the person;

(6) Adjustments allowed to customers may be excluded from "gross receipts" if they are deducted on the face of the invoice as a medium of adjusting the price or fee for the service and if they are not reimbursed to the person by his supplier or some other person;

(7) Where a transaction involves both the performance of a service and the sale of any goods or property, the portion of the receipts applicable to the sale of goods or property may be excluded; provided, that the sale portion is separately stated upon the invoice or bill to the customer and the applicable sales tax is charged, collected and remitted to the Commonwealth of Pennsylvania and the applicable Mercantile License Tax under Title 2, Chapter 7, Article 2, of the Township Code of Upper Moreland Township is paid on such sale portion;

(8) Federal, State, and local taxes may be excluded from "gross receipts" if they are collected from the customer and are separately stated on the evidence of charge or sale, or the taxpayer produces satisfactory proof of payment of the Federal, State, or local taxes;

(9) The Collector shall promulgate rules and regulations setting forth methods of allocation of gross receipts for such cases where the gross receipts of a business in its entirety are not subject to tax imposed by this

Ordinance by reason of the provisions of the Commerce Clause of the United States Constitution or under the Constitution of the Commonwealth of Pennsylvania;

(10) Any rental income received from the rental of not more than one dwelling unit in a building to a person related to the lessor by birth, marriage, or adopted; provided, that the lessor also resides in a dwelling unit within the building.

(g) "Collector" shall mean the Business Tax Office of the Township and all duly authorized Business Tax Officers.

(h) "Temporary, Seasonal, or Itinerant Business" shall mean any business that is conducted at one, location for less than sixty (60) consecutive calendar days.

(i) "Secretary" shall mean the Secretary of the Township of Upper Moreland.

(j) "Township" shall mean the Township of Upper Moreland.

(k) "Assessment" shall mean the determination of Business Taxes due from a taxpayer as the result of an audit or review of tax returns: filed with the Township.

(l) "Audit" shall mean an inspection of the books and accounting records of a taxpayer by the designated auditor or Business Tax Officer for the Township of Upper Moreland for the purpose of verifying the correct payment of business taxes and occupational privilege tax by the taxpayer. An audit may be conducted in person at the taxpayer's location, at the Business Tax Office or through the provision of copies of requested records to the Business Tax Office through the mail.

(m) "Credit" shall mean an overpayment made to the Township of Business Privilege Tax, Mercantile License Tax or Occupational Privilege Tax. A credit may be used to satisfy future business tax obligations upon the writen [sic] request of the taxpayer and the filing of all required tax returns.

(n) "Determination" shall mean a decision by the Business Tax Office including an assessment of tax due or payment or denial of a refund or credit.

Section 1.03 APPLICABILITY OF ORDINANCE

(a) The registration and tax provisions of this Ordinance apply to any person engaging in any business, trade, occupation, profession, or vocation in which there is offered any service or services to the general public or a limited number of the general public for a consideration *except* for persons who are wholesale or retail vendors or dealers in goods or who conduct restaurants or other places where food or beverages are sold and who are thus subject to the Mercantile License Tax Ordinance, Title 2, Chapter 7, Article 2, of the Township Code of Upper Moreland Township.

(b) The Ordinance applies not only to businesses in existence at the beginning of the license year, but also to businesses begun during the tax year or carried on in the Township for any part of the tax year.

(c) A person engaged in any business, trade, occupation profession, or vocation shall have the burden of proof with respect to the assertion of any claim that the business, trade, occupation, profession or vocation or that the gross receipts or any portion of such gross receipts, is

excludable from the tax imposed by this Ordinance or that any provision of this Ordinance is inapplicable to such person.

Section 1.04 TAX LEVY AND RATE

Every person engaging in a business, trade, occupation, profession or vocation in the Township shall pay an annual Business Privilege Tax for the tax year at the rate of three and one-half (3.5) mills on his gross receipts; provided no tax will be levied on any person who has registered with the Township and whose gross receipts are Two Thousand Nine Hundred ($2,900.00) Dollars or less, provided that a tax return is filed.

Section 1.05 REGISTRATION

Every person engaged in a business, trade, occupation, profession or vocation within the Township, shall register with the Collector by completing the application form devised by the Collector and to furnish the information required by such form, including, but not limited to; name, address, business address, nature of business, trade, occupation, profession, or vocation. Such registration shall be done without regard for whether any tax will be due and payable. The Collector shall, upon completion of the registration form, issue a Certificate of Registration to such person. A separate Certificate of Registration must be obtained each year for each place of business in the Township. The Certificate must be obtained on or before January 15 of each tax year if the business was begun prior to that tax year. If a business is begun or a new place of business established during the tax year, the Certificate must be obtained prior to commencing business. The

Certificate shall be valid for the location for which it was issued and the applicant only and shall not be assignable.

Section 1.06 REGISTRATION PERIOD

The Certificate is issued for a tax year from January 1 to December 31 of each year. A Certificate obtained at any time during the year is valid only from the date of issue until the end of the year with respect to which it is issued.

Section 1.07 REGISTRATION FEES

Before the issuance of a Certificate, the applicant shall make payment to the Collector of a registration fee for each place of business. The fee shall be that set by the Board of Commissioners and set forth in Title 2, Chapter 1, Fees, Rates, and Permits of the Upper Moreland Township Code.

Section 1.08 LATE CHARGES

All registration fees due under this Ordinance and not paid by January 15 of the tax year, shall bear interest at the rate of ten (10%) percent per month or fractional part of a month from the day they are due and payable until paid. If any person shall neglect or refuse to obtain a registration certificate as herein required; an additional penalty of ten (10%) percent of the registration fee shall be added by the Collector and collected.

Section 1.09 FORMS AND WHERE TO FILE

(a) The application for Certificate of Registration forms shall be available from the Collector of Business

Privilege Tax, 117 Park Avenue, Willow Grove, Pennsylvania 19090. Failure to obtain or receive the application form shall not excuse any person from the obligation to file and obtain the Registration Certificate or the business privilege tax return or payment of the applicable tax hereunder.

(b) Each application for registration shall be signed by the applicant if a natural person, and in the case of an association or a partnership, by a member or partner thereof, and in the case of a corporation, by an officer thereof.

(c) All applications for Certificates of Registration shall be filed with the Collector of Business Privilege Tax, 117 Park Avenue, Willow Grove, Pennsylvania 19090.

Section 1.10 TIME OF FILING

Every person subject to this Ordinance shall file a return as follows:

(a) If the person has commenced business prior to January 1 of the tax year, the return shall be filed and received by the Collector on or before May 1 of the tax year;

(b) If the person commences business after January 1 of the tax year, the return shall be filed and received by the Collector within forty (40) days from the date of commencing business;

(c) If the person is engaged in a business which is temporary, seasonal, or itinerant in its nature, the return shall be filed and received by the Collector within seven (7) days, of the completion of such business;

(d) If the person discontinues, terminates, or otherwise ceases business activity at the registered location, the return shall be filed and received by the Collector within thirty (30) days of the termination.

Section 1.11 CASH OR ACCRUAL BASIS

A tax return may be filed on a cash basis or on an accrual basis, but the return must be prepared in accordance with the method of accounting regularly employed in keeping the books of the taxpayer. A person who keeps his books on the cash basis will report his gross receipts on the basis of amounts actually received during the period used as the measure of the tax. A taxpayer who keeps his books on the accrual basis will report the receipts from all sales made or services rendered during the tax year irrespective of the date when such monies are collected from the customer. In either case, the taxpayer must file on a calendar year basis beginning January 1 and ending December 31, regardless of the taxpayer's fiscal year.

Section 1.12 ESTIMATED GROSS RECEIPTS

The estimated gross receipts for any tax year shall be determined as follows:

(a) If the taxpayer has been engaged in business for a full year prior to January 1 of the tax year, *the actual gross receipts for that prior year shall be the estimated gross receipts for the tax year.*

(b) If the taxpayer has been engaged in business prior to January 1 of the tax, year, but for less than one (1) full year, the estimated gross receipts shall be the average

monthly gross receipts for the prior year multiplied by twelve (12).

(c) If the taxpayer commences business during the tax year, the estimated gross receipts shall be determined by multiplying the gross receipts for the first month of business by the number of months remaining in the tax year.

(d) In the case of a temporary, seasonal, or itinerant business for which a return is filed as provided in paragraph 1.10(c) above, no estimate is computed. Instead, the tax is imposed on the actual gross receipts during the period covered by the return.

(e) Any person who engages in business with gross receipts from wholesale or retail sales of merchandise or from a restaurant and from service, who registers under this Ordinance, as opposed to the Mercantile License Tax Ordinance, shall combine and report gross receipts in a single return.

Section 1.13 PAYMENT OF TAX; CREDITS

(a) At the time of filing the tax return on May 1 of the tax year except as hereinbefore provided, the person shall pay in a single payment an amount equal to the estimated tax, for the current tax year and any balance due for actual gross receipts for the prior year.

(b) Any person with a decrease in actual gross receipts from that estimated on the prior year's return shall be entitled to a credit on the estimated tax for the current year in an amount equal to the overpayment of tax for the prior year.

(c) Tax credits resulting from overpayment by a taxpayer may only be utilized after all then due tax returns have been filed with the Tax Office. Failure to file a completed tax return as required will prevent the utilization of any accrued credits.

Section 1.14 DUTIES OF THE COLLECTOR

(a) It shall be the duty of the Collector to collect and receive all fees, taxes, interest, fines, and penalties imposed by this Ordinance and to maintain a record of all payments received and the date thereof.

(b) The Collector shall pay all fees, taxes, interest, fines and penalties collected, received, or recovered under the provisions of this Ordinance into the Treasury of the Township for the use and benefit of the Township.

(c) The Collector is hereby authorized and empowered to enforce the provisions of this Ordinance and for such purpose is duly constituted a law enforcement officer for the purpose of instituting summary proceedings under this Ordinance pursuant to the Pennsylvania Rules of Criminal Procedure.

Section 1.15 BOOKS AND RECORDS

The Collector or representative of the Collector may request the production for inspection and copying books and records, including Federal Income Tax Returns and State Sales Tax Returns with appropriate accompanying Schedules, as will enable the Collector to determine the accuracy of the taxpayer's return. Any person claiming any exclusion for any portion of the gross receipts must maintain complete records in support of such claim.

Section 1.16 INSPECTION AND EXAMINATION

The Collector or other designated representative is authorized to examine the books, papers, and records of any taxpayer or supposed taxpayer in order to verify the accuracy of any return made or if no return was made, then to ascertain whether a tax should be imposed and, if so, the amount of such tax. He is further authorized to examine any person connected with any business concerning any gross receipts of the business which were or should have been returned for taxation, and for this purpose, may compel the production of books, papers, records, and the attendance of all persons before him, whether as parties or witnesses, whom he believes to have knowledge of such business or gross receipts. The failure to provide such records or to submit to the examination shall be a violation of this Ordinance and shall subject such person to the penalties as set forth in Section 1.20 of this Ordinance. Each day such person shall fail or refuse to provide such records or submit to such examination shall constitute a separate offense.

Section 1.17 SUITS FOR RECOVERY OF UNPAID TAXES

No assessment of any tax may be made more than five (5) years after the date on which such taxes should have been paid unless a fraudulent return or no return is filed, in which case there shall be no limitations. Suits for recovery of taxes may be brought within six (6) years of the date of assessment or date due, whichever is later, by the Collector or Township Solicitor as other debts due the Township are by law recoverable.

Section 1.18 REFUNDS

(a) Any claim for a refund or use as a credit of the overpayment of the tax imposed by this Ordinance must be made in writing within three (3) years of the due date for filing the tax return or one (1) year after the actual payment of the tax, whichever is later.

(b) No refund or credit will be issued to a taxpayer unless all then currently due tax returns required under this Ordinance and the Mercantile License Tax Ordinance have been filed. The Tax Office shall notify the taxpayer in writing if there are any outstanding returns required to be filed before the issuance of a credit or refund. Said return must be filed before the expiration of time for requesting a refund or credit as set forth in subsection (a) above or within 30 days of the notice from the Tax Officer if the time limitations in subsection (a) expired after the request for refund or credit was received.

(c) A refund or credit accrued as a result of overpayment of Business Privilege Tax may be applied as payment for tax due under either the Business Privilege Tax Ordinance, the Mercantile License Tax Ordinance or the Occupational Privilege Tax Ordinance.

(d) A taxpayer may appeal the denial of any request for refund or credit to the Township Tax Review Board in accordance with Article 7, of this Chapter.

Section 1.19 PENALTY & INTEREST FOR NON-PAYMENT

If for any reason the tax is not paid when due, interest at the rate of one and one-quarter (1 1/4%) percent of the amount of the unpaid tax for each month or fraction

thereof during which the tax remains unpaid shall be added to the tax. A penalty shall also be assessed in the amount of ten (10%) percent of the unpaid business privilege tax balance due.

Section 1.20 FINE FOR VIOLATION OF ORDINANCE

Any person who fails, refuses, or neglects to comply with the provisions of this Ordinance may be punishable by a fine of not less than Fifty Dollars ($50.00) and not more than Six Hundred Dollars ($600.00) plus costs of prosecution upon conviction before a District Justice.

Section 1.21 AGREEMENTS

The Collector is hereby authorized to enter into such agreements with officials of other political subdivisions of the Commonwealth of Pennsylvania for the purpose of collection of taxes imposed by this Ordinance and with the Secretary of the Treasury of the United States for access to copies of Federal Tax Returns for the purpose, of collecting the tax hereby imposed.

Section 1.22 SEVERABILITY

The provisions of this Ordinance are severable and in the event that any section, sentence, clause or provision of this Ordinance is declared invalid or unconstitutional by any Court of competent jurisdiction, such decision shall not affect or impair the remaining provisions of this Ordinance.

Section 1.23 Notice to Taxpayer

Each taxpayer contacted by the Business Tax Office regarding the assessment, audit, determination, review or collection of Business Privilege Tax shall receive a Notice containing the following information:

> "You are entitled to receive a written explanation of your rights with regard to the audit, appeal, enforcement, refund and collection of local taxes by calling the Business Tax Office at (215) 659-3100, extensions 343 or 351, during the hours of 8:30 AM to 4:30 PM Monday through Friday."

Section 1.24 Appeal of Determination

A taxpayer may appeal any determination of the Tax Office, including an assessment, determination of underpayment, denial of refund or credit to the Tax Review Board as set forth in Article 7 of this Chapter.

Section 1.25 Installment Agreements

The Business Tax Office may enter into an installment payment agreement under which a taxpayer will satisfy an existing tax liability with a series of payments over time, if in the Tax Officer's professional opinion, such an agreement will facilitate the collection of the tax outstanding. The duration and amount of the payment and other terms and conditions shall be at the discretion of the Business Tax Office. The installment agreement may combine payments for all eligible taxes in one payment.

APPENDIX F

REGULATIONS UNDER ARTICLE I, "BUSINESS PRIVILEGE TAX," OF CHAPTER 7 OF TITLE 2 OF THE UPPER MORELAND TOWNSHIP CODE PROVIDING FOR THE ALLOCATION OF GROSS RECEIPTS IN THE CASE OF BUSINESS WITH MULTI-STATE OFFICES ENGAGED IN INTER-STATE COMMERCE.

1. *APPLICABILITY.* The allocation of gross receipts provided for in this Regulation shall apply to, and only to, persons, as defined in the Ordinance, engaged in interstate commerce, having places of business in more than one State. This Regulation shall not apply to or be deemed to apply to any intrastate transactions or to otherwise limit.

2. *ALLOCATION.* In the case of transactions involving interstate commerce, in conformity with the commerce clause of the United States Constitution, an apportionment of gross receipts will be made based upon the following formula:

(Receipts within Commonwealth of PA x 100%) +

(Receipts without Commonwealth of PA x apportionment factor) =

Gross Receipts that Tax is applied to.

The "Apportionment" Factor shall be in the product of the averaging of the total of the following percentages:

(i) Wages, salaries, commissions and other compensation in township, as a percentage of total wages, salaries, commissions and other compensation.

(ii) Receipts in Township as a percentage of total receipts.

(iii) Value of the tangible personal and real property owned or leased and situated within the Township as a percentage of total tangible personal and real property owned or leased.

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(3)

No. 04-1046

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In the

Supreme Court of the United States

TOWNSHIP OF UPPER MORELAND,

Petitioner,

v.

NORTHWOOD CONSTRUCTION COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF IN OPPOSITION FOR RESPONDENT NORTHWOOD CONSTRUCTION COMPANY

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QUESTIONS PRESENTED

1. Whether the Supreme Court of Pennsylvania correctly held that an unapportioned local gross receipts tax which reaches beyond the portion of value fairly attributable to the taxpayer's economic activity within the taxing jurisdiction is not externally consistent under the fair apportionment prong of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977).

2. Whether a state court may require a local taxing authority to implement some apportionment formula for imposing a business privilege tax upon the gross receipts of a taxpayer that conducts substantial activity in interstate commerce outside the taxing jurisdiction so that the tax is fairly apportioned.

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COUNTERSTATEMENT OF THE CASE

Respondent, Northwood Construction Company, Inc. ("Northwood"), is a business corporation that performs construction management and general contracting services. 2a.[1] It has been stipulated that Northwood conducts its business activities in Pennsylvania, New Jersey, Delaware and Maryland, with as much as 55% of its annual gross receipts attributable to business activities conducted outside Pennsylvania during the tax years at issue. 2a, 27a. Despite this fact, Petitioner, the Township of Upper Moreland (the "Township"), asserts that taxation of 100% of Northwood's gross receipts pursuant to the Township's Business Privilege Tax Ordinance (the "Ordinance") does not violate the Commerce Clause of the United States Constitution.

While Northwood's principal place of business is within the Township in Willow Grove, Pennsylvania, for each of its construction projects, Northwood establishes and maintains on-site trailer facilities which serve as field offices. 4a n.1. On-site facilities may be maintained for a period of years and have all the amenities of any office, including phone, utility, fax and copier services, offices and conference rooms. *Id.* The facilities are used for the benefit of employees, customers, vendors and suppliers, and are required to manage the full time employees and construction activities of the specific projects. *Id.* These facilities are critical to Northwood's business activities outside the Township, both intrastate and interstate.

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[1] Numeric citations followed by the letter "a", *i.e.* 1a, refer to the Appendix to the Petition for a Writ of Certiorari.

The Ordinance imposes a business privilege tax ("BPT") upon the gross receipts of any person "engaging in business in the Township." Ordinance § 1.04, 64a. The Ordinance provides for the creation of a method for allocating a taxpayer's gross receipts (the "Allocation Regulations") to comply with the Commerce Clause. Ordinance § 1.02, 61a-62a. The Allocation Regulations apply only to taxpayers having offices in more than one state. Ordinance Appendix F, 74a. The Township's position is that Northwood's on-site facilities are not *bona fide* offices, and the Allocation Regulations therefore do not apply. 23a n.13. Rather, based upon Northwood's maintenance of a principal place of business in the Township and its use of on-site facilities to conduct and manage its business outside Pennsylvania, the Township taxes 100% of Northwood's gross receipts.

The Ordinance excludes from the Township's BPT gross receipts "upon which a business privilege tax or similar tax has been imposed by another political subdivision by reason of the performance of the service or conducting the business in that political subdivision" (the "Exclusionary Provision"). Ordinance § 102(f)(4), 60a. It is undisputed that Northwood pays taxes based upon its gross receipts/net income attributable to other states based upon its on-site facilities and economic activities within those states. 27a n.18, 30a n.19, 31a n.20. However, these taxes are paid at the state level, and Northwood receives no credit for them because the Township interprets its Exclusionary Provision to apply only to taxes paid to political *subdivisions*. 27a n.18.

These same on-site facilities which the Township claims are not *bona fide* offices that would trigger the Ordinance's Allocation Regulations do in fact subject Northwood to BPTs and similar taxes in other municipalities within Pennsylvania. 6a-7a. Based upon Northwood's facilities and

economic activities in other Pennsylvania municipalities, Northwood is considered to be "doing business" within those municipalities and taxed appropriately. *Id.* Pursuant to the Ordinance's Exclusionary Provision, the Township gives Northwood credit for these intrastate taxes. 6a, 7a n.5, 36a-37a.

Northwood challenged the Township's taxation of 100% of its gross receipts as unconstitutional under the Commerce Clause and the test established by this Court in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977), to evaluate the constitutionality of state and local taxes. 9a, 39a-40a, 48a. The Pennsylvania Supreme Court held that the Ordinance violates the Commerce Clause because it is not fairly apportioned as required by *Complete Auto*. 19a. Specifically, the court concluded that the Ordinance is not "externally consistent" since, by subjecting 100% of Northwood's gross receipts to its BPT, the Township is plainly taxing more than that portion of the revenues from Northwood's interstate activities which is fairly attributable to the privilege of maintaining an office in the Township. 30a-31a.

REASONS FOR DENYING THE WRIT

This case presents a straightforward and correct application of the test this Court established almost thirty years ago in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977), to evaluate the constitutionality of a state or local tax under the Commerce Clause. A tax fails the *Complete Auto* analysis unless it: (1) is applied to an activity with a substantial nexus with the taxing state; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to the benefits provided by the state. *Id.* The Pennsylvania Supreme Court held that the Township's Ordinance is unconstitutional because it is not externally consistent and thus not fairly apportioned. 31a. Because it determined that the Ordinance fails the second prong of the *Complete Auto* test, the court did not address the third and fourth prongs. 19a. Northwood submits that the Ordinance also fails these prongs.[2]

The petition does not meet any of this Court's criteria for a grant of certiorari. The Township has pointed to no prior decision of this Court which presents any legitimate conflict with the decision below. The Pennsylvania Supreme Court and other state courts have properly interpreted this Court's precedents concerning the constitutional

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[2] The Pennsylvania Supreme Court held that if the Township were to apply the Exclusionary Provision of its Ordinance, the Ordinance would be internally consistent as also required by the fair apportionment prong of *Complete Auto*. 24a-26a. However, the court's analysis assumed that the Exclusionary Provision would be applied to give credit for taxes paid at the state as well as the local level. 25a. The Township does not so apply the Exclusionary Provision, *see* 27a n.18, and Northwood submits that the Ordinance is not internally consistent as it is applied.

requirements for gross receipts taxes, and those precedents were correctly applied to the particular facts presented here. The Pennsylvania Supreme Court correctly held that in taxing Northwood's gross receipts the Township is required to make an apportionment between receipts attributable to Northwood's local office and receipts from its out-of-state business. Contrary to the Township's suggestion, it retains complete discretion as to the specific constitutional apportionment formula it may adopt going forward.

A. The Pennsylvania Supreme Court and Other State Courts Have Correctly Applied This Court's Precedents Concerning the Fair Apportionment Requirements for State and Local Gross Receipts Taxes Mandated by the Commerce Clause.

In an effort to create an appearance of confusion that might warrant this Court's intervention, the Township suggests that the decision below and other state decisions invalidating unapportioned gross receipts taxes have erroneously relied upon *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175 (1995), a sales tax case. Pet. at 8. To the contrary, in determining that the Township's BPT is not externally consistent the Pennsylvania Supreme Court did not misread *Jefferson Lines*, which discusses gross receipts taxes as well as sales taxes, nor have other state courts.

In *Jefferson Lines*, 514 U.S. at 190-91, this Court upheld an unapportioned Oklahoma sales tax, distinguishing it from a superficially similar unapportioned New York gross receipts tax that was struck down in *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653, 660 (1948). The Court's application of the external consistency test to the two taxes was the critical distinguishing factor between them.

The external consistency test evaluates whether the taxing authority's claim upon the value taxed is economically justified and asks whether a tax reaches beyond that portion of value fairly attributable to the taxpayer's economic activity within the taxing jurisdiction. *See, e.g. Hunt-Wesson, Inc. v. Franchise Tax Board of California*, 528 U.S. 458, 464 (2000); *Goldberg v. Sweet*, 488 U.S. 252, 262 (1989). In contrast, the internal consistency test looks at the tax's structure and determines whether multiple taxation would occur if every state applied the identical scheme. *Goldberg*, 488 U.S. at 261. Although the Township claims that the distinction between the two tests is becoming "blurred," Pet. at 9, this Court, the Pennsylvania Supreme Court, and other state courts continue to apply them separately. *See Jefferson Lines*, 514 U.S. at 184-85; 19a, 26a; *City of Winchester v. American Woodmark Corp.*, 471 S.E.2d 495, 497 (Va. 1996); *Southern Pacific Transp. Co. v. Arizona*, 44 P.3d 1006, 1010 (Ariz. Ct. App. 2002).

In *Jefferson Lines*, this Court provided a reasoned analysis of why application of the external consistency test is fundamentally different for a sales tax and a gross receipts tax. The Court explained that a sale is "a discrete event facilitated by the laws and amenities of the place of sale" that is "wholly local." 514 U.S. at 186-88. Thus, the state in which the sale occurs has an economic justification to tax the entire gross receipts derived, even though interstate events may contribute to that value. *Id.* at 188-89.

In contrast, gross receipts taxes "diverge crucially [from sales taxes] in the identity of the taxpayers and the consequent opportunities that are understood to exist for multiple taxation of the same taxpayer." *Id.* at 190. As stated by this Court, a gross receipts tax is "simply a variety

of tax on income, which [i]s required to be apportioned to reflect the location of the various interstate activities by which it was earned." *Id.* Proof that the Township's BPT is such "a variety of tax on income" is in the very language of the Ordinance, which defines "gross receipts" as any "cash, credits, property of any kind or nature, received or allocable or attributable to any business." Ordinance § 1.04, 60a. The Township's BPT thus fully merits the *Jefferson Lines* analogy to the unapportioned gross receipts tax struck down in *Central Greyhound*.

The Township contends that in quoting portions of this Court's opinion from *Jefferson Lines* that do *not* refer to sales taxes, state courts have somehow undermined "an entire line of this Court's cases specifically upholding unapportioned gross receipts taxes." Pet. at 9. The cases cited by the Township do not support its contention. *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*, 483 U.S. 232 (1987), and *Standard Pressed Steel Co. v. Washington Department of Revenue*, 419 U.S. 560 (1975), each involved a tax imposed upon the activity of wholesaling which was assessed only upon the sales activities of the out-of-state taxpayer that occurred within the taxing state of Washington. Unlike the Township here, Washington never asserted that it could reasonably impose its tax upon the gross receipts of the taxpayer attributable to sales activities in other states. Instead, Washington stood in the position of Delaware, Maryland, or New Jersey in this case, asserting its constitutional right to tax that portion of Northwood's gross receipts attributable to the company's business activities within that jurisdiction.

The gross receipts taxes in the other cases cited by the Township also are quite different from that presented here.

The services that were taxed in *Department of Treasury v. Ingram-Richardson Mfg. Co.*, 313 U.S. 252, 255 (1941), and *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254 (1938), were performed entirely within the taxing states and involved only incidental interstate activity. In stark contrast, the Township taxes 100% of Northwood's gross receipts from construction activities that occur wholly outside Pennsylvania. The Township never attempts to explain how the Ordinance can pass muster under the external consistency test in light of this undisputed fact.

The Pennsylvania Supreme Court correctly held that the Township is plainly taxing revenues out of all proportion to the value contributed to Northwood's business by the in-state activity being taxed – the privilege of maintaining an office in the Township – and thus has violated the fair apportionment prong of *Complete Auto*. 30a-31a. The Township has provided no justification for this Court's review of that determination.

B. The Pennsylvania Supreme Court Properly Left the Local Taxing Authority Broad Discretion To Establish Any Apportionment Formula That Reasonably Reflects the Local Component of the Activity Being Taxed.

In crafting a second question presented that poses an undisputed point of law, *see* Pet. at i, 11, the Township distorts the facts of this case, the holding of the Pennsylvania Supreme Court, and this Court's precedents concerning apportionment formulas. The Pennsylvania Supreme Court did not ignore the provisions of the Ordinance or mandate any specific apportionment formula for the Township to follow. The court merely held: (1) that Township failed to

apply any apportionment formula to Northwood, and (2) that the Ordinance is unconstitutional unless it applies *some* constitutional formula in order to satisfy the fair apportionment test of *Complete Auto.*

Northwood has never argued in this case that the Township is required to use a particular apportionment formula or method. Northwood's position rather has been that the Township may not tax 100% of the gross receipts it earns outside Pennsylvania without violating the Commerce Clause. *See* 18a, 39a, 48a. The Township takes the contrary position that no matter how much of a taxpayer's gross receipts are generated in interstate commerce, no apportionment is required unless the taxpayer has multi-state offices. Pet. at 11. Following this argument to its logical conclusion, even if a taxpayer had an actual physical presence[3] in other states through which it conducted 100% of its business in those states (*i.e.*, it engaged only in interstate commerce), because the taxpayer lacked a *bona fide* office in the other states the Township would still be entitled to tax 100% of its gross receipts.

The Pennsylvania Supreme Court correctly disagreed with the Township's position that Northwood's maintenance of a primary business office in the Township permits it to tax Northwood's total receipts for activities which take place to a substantial extent outside Pennsylvania. 30a; *see Central Greyhound,* 334 U.S. at 660. This holding by no means stripped the Township of the "wide latitude" granted to local taxing authorities in fashioning apportionment formulas. *Moorman Mfg. Co. v. Bair,* 437 U.S. 267, 274 (1978). The court merely concluded in accord with this Court's

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[3] *See Quill Corp. v. North Dakota,* 504 U.S. 298, 311-12 (1992).

precedents that the Township must at least apply an apportionment formula with a "factor or factors [which] actually reflect a reasonable sense of how income is generated." *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159, 169 (1983).

The Township argues that the Exclusionary Provision of its Ordinance made apportionment unnecessary, since it ensured that multiple taxation would not occur. Pet. at 12. As the Pennsylvania Supreme Court recognized in rejecting this argument, this Court's precedents make clear that, for the purpose of external consistency, apportionment obligations are not satisfied by merely eliminating the risk of multiple taxation. 30a, *citing Jefferson Lines*, 514 U.S. at 185. Moreover, as the court also noted, the Township has *not* excluded from Northwood's taxable gross receipts any receipts upon which taxes were paid to other states. 27a n.18, 30a n.19. Despite stipulating that Northwood paid either gross receipts taxes or net income taxes to other states, the Township contends that these taxes were not "business privilege tax[es] or similar tax[es] ... imposed by another political subdivision by reason of the performance of the service or conducting of business in the political subdivision" so as to trigger the Exclusionary Provision. Pet. at 5, 27a n.18. Ironically, the Township has interpreted the language of its Ordinance so that, as applied, it does not even pass the internal consistency test.

In short, the Pennsylvania Supreme Court rightly rejected the Township's attempt to justify its total lack of apportionment as to Northwood, noting this Court's precedent that "the central purpose behind the apportionment requirement is to ensure that each state taxes only its fair share of an interstate transaction." *Goldberg*, 488

U.S. at 260, *quoted at* 29a. The court correctly held that the Township's assessment of its BPT upon 100% of Northwood's gross receipts from all interstate activities, with no apportionment, does not "reasonably reflect[] the in-state component of the activity being taxed." *Goldberg*, 488 U.S. at 262, *quoted at* 30a.

CONCLUSION

Because the Pennsylvania Supreme Court correctly interpreted this Court's precedents in determining that the Township's unapportioned Business Privilege Tax was unconstitutional since it did not satisfy the external consistency test of *Complete Auto*, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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(2)

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TOWNSHIP OF UPPER MORELAND,

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v.

NORTHWOOD CONSTRUCTION COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Pennsylvania

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

Petitioner, Township of Upper Moreland ("Upper Moreland"), respectfully submits this reply to address several new points raised by Respondent, Northwood Construction Company ("Northwood"), in its brief in opposition ("Opposition Brief") to Upper Moreland's Petition for a writ of certiorari.

Lacking a legitimate response to the sole issues presented by Upper Moreland's petition – *i.e.*, (i) whether the Supreme Court of Pennsylvania's decision conflicts with this Court's decisions upholding unapportioned gross receipts taxes, and (ii) whether the Pennsylvania Supreme Court improperly imposed on Upper Moreland a single formula for the apportionment of the interstate income of a taxpayer with its only office within Upper Moreland – Northwood attempts instead to distract the Court with irrelevant and incorrect facts and non-responsive arguments.

Thus, for example, Northwood continues to press its position – which was ***rejected*** by the Pennsylvania courts – that its temporary job-site trailers are *bona fide* offices "with phone, utility, fax and copier services" that are "critical to Northwood's business activities outside the Township." Opp'n Br. at 1. Northwood took that position below in support of its unavailing argument that Upper Moreland's Business Privilege Tax ("BPT") was not authorized by Pennsylvania's Local Tax Enabling Act. Irrespective of its lack of merit, that argument – which the Pennsylvania Supreme Court discussed at length and rejected, *see* App. at 11a-18a – is entirely irrelevant to the issues presented here.

To the extent that it were relevant at all whether Northwood's trailers constituted *bona fide* offices, the

Pennsylvania Supreme Court ***accepted*** Upper Moreland's interpretation that its Allocation Regulations were not triggered with respect to Northwood because Northwood did not have any *bona fide* offices outside Upper Moreland. App. at 23a n.13. Indeed, the Pennsylvania Supreme Court held that "supervision of projects from temporary on-site offices simply 'does not negate the fact that the root of all of the company's business is at its sole permanent business headquarters.'" App. at 16a (agreeing with, and quoting, the Pennsylvania Commonwealth Court). Yet, as Upper Moreland noted in its Petition, the Pennsylvania Supreme Court improperly ignored that fact and thus effectively required Upper Moreland to rewrite its Allocation Regulations in contravention of this Court's precedent giving local governments discretion to craft such regulations. Pet. at 7-8; 11.

In a further futile attempt to justify the Pennsylvania Supreme Court's improper imposition on the Township of a particular apportionment formula, Northwood falsely asserts that Upper Moreland stipulated that Northwood paid "either gross receipts taxes or net income taxes to other states." Opp'n Br. at 10. Although Upper Moreland stipulated that Northwood paid such taxes to ***other Pennsylvania municipalities***, App. at 7a n.5, and Upper Moreland correctly excluded receipts from those municipalities in calculating Northwood's BPT liability, Upper Moreland did ***not*** stipulate that Northwood paid gross receipts or similar taxes in other states because that is not true. *See* App. at 27a n.18. Accordingly, Northwood cannot contend that it was subject to multiple taxation.

Finally, demonstrating its understandable lack of confidence in the argument that the BPT is not externally consistent for purposes of the fair apportionment prong of the test for the constitutionality of state and local taxes set

forth in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), Northwood resorts to arguing in the alternative that the BPT is ***internally*** consistent and that it fails the discrimination and fair relation prongs of the *Complete Auto* test. Opp'n Br. at 4; 4 n.21; 10. Significantly, however, the Pennsylvania courts uniformly held that the BPT was internally consistent. App. at 24a-26a (Pa. Sup. Ct.); 41a (Pa. Commw. Ct.); 53a-54a. (Pa. Com. Pl. Ct.). Moreover, the two lower courts found that the BPT satisfied all parts of the *Complete Auto* test, and the Pennsylvania Supreme Court did not address the discrimination and fair relation prongs. App. at 42a-44a (Commw. Ct.); 54a (Com. Pl. Ct.); 19a (Sup. Ct.). Whether those decisions were correct, however, has no bearing whatsoever on Upper Moreland's Petition.

CONCLUSION

Cleared of its diversionary underbrush, Northwood's Opposition Brief offers no reason why Upper Moreland's petition for a writ of certiorari should not be granted.

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